No. 15-827

Title:	Endrew F., a Minor, By and Through His Parents and Next Friends, Joseph F. and Jennifer F., Petitioner v. Douglas County School District RE-1
Docketed:	December 24, 2015
Lower Ct:	United States Court of Appeals for the Tenth Circuit
Case Nos.:	(14-1417)
Decision Date:	August 25, 2015
Rehearing Denied:	September 24, 2015

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Dec 22 2015	Petition for a writ of certiorari filed. (Response due January 25, 2016)
Jan 25 2016	Brief amici curiae of Autism Speaks and The Public Interest Law Center filed.
Feb 10 2016	DISTRIBUTED for Conference of February 26, 2016.
Feb 22 2016	Response Requested. (Due March 23, 2016)
Mar 9 2016	Order extending time to file response to petition to and including April 15, 2016.
Apr 15 2016	Brief of respondent Douglas County School District RE-1 in opposition filed.
May 2 2016	Reply of petitioner Endrew F., a Minor, By and Through His Parents and Next Friends, Joseph F. and Jennifer F. filed.
May 3 2016	DISTRIBUTED for Conference of May 19, 2016.
May 23 2016	DISTRIBUTED for Conference of May 26, 2016.
May 31 2016	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Aug 18 2016	Brief amicus curiae of United States filed.
Sep 6 2016	Supplemental brief of respondent Douglas County School District RE-1 filed.
Sep 7 2016	DISTRIBUTED for Conference of September 26, 2016.
Sep 29 2016	Petition GRANTED.
Nov 8 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioner.
Nov 14 2016	Brief of petitioner Endrew F., a Minor, By and Through His Parents and Next Friends, Joseph F. and Jennifer F. filed.
Nov 14 2016	Joint appendix filed. (Statement of costs filed.)
Nov 14 2016	Supplemental Joint appendix filed.
Nov 15 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent.
Nov 17 2016	Brief amicus curiae of National Association of State Directors of Special Education, in support of neither party filed.
Nov 21 2016	Brief amicus curiae of United States filed.
Nov 21 2016	Brief amici curiae of 118 Members of Congress filed.
Nov 21 2016	Brief amici curiae of Advocates for Children of New York, et al. filed.
Nov 21 2016	Brief amici curiae of Former Officials of the U.S. Department of Education filed.

Nov 21 2016	Brief amici curiae of National Disability Rights Network, et al. filed.
Nov 21 2016	Brief amici curiae of Disability Rights Organizations, et al. filed.
Nov 21 2016	Brief amicus curiae of National Education Association filed.
Nov 21 2016	Brief amici curiae of Council of Parent Attorneys and Advocates, et al. filed.
Nov 21 2016	Brief amici curiae of Coalition of Texans with Disabilities, et al. filed.
Nov 21 2016	Brief amici curiae of Delaware, et al. filed.
Nov 21 2016	Brief amici curiae of National Center for Special Education in Charter Schools, et al. filed.
Dec 5 2016	SET FOR ARGUMENT on Wednesday, January 11, 2017.
Dec 7 2016	Record requested from the U.S.C.A. 10th Circuit.
Dec 7 2016	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 9 2016	Record received from the U.S.C.A. 10th Circuit. The record is located on PACER, with the exception of the pleadings enclosed in one box.
Dec 12 2016	CIRCULATED.
Dec 14 2016	Brief of respondent Douglas County School District RE-1 filed. (Distributed)
Dec 21 2016	Brief amicus curiae of Council of the Great City Schools filed. (Distributed)
Dec 21 2016	Brief amici curiae of AASA, The School Superintendents Association, et al. filed. (Distributed)
Dec 21 2016	Brief amici curiae of Colorado State Board of Education and Colorado Department of Education filed. (Distributed)
Dec 21 2016	Brief amici curiae of National School Boards Association, et al. filed. (Distributed)
Dec 28 2016	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Dec 30 2016	Reply of petitioner Endrew F., a Minor, By and Through His Parents and Next Friends, Joseph F. and Jennifer F. filed. (Distributed)
Jan 11 2017	Argued. For petitioners Jeffrey L. Fisher, Stanford, Cal.; and Irv Gornstein, Counselor to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Neal K. Katyal, Washington, D. C.
Mar 22 2017	Judgment VACATED and case REMANDED. Roberts, C. J., delivered the opinion for a unanimous Court.
Apr 24 2017	JUDGMENT ISSUED.

~~Name~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~Address~~~~~~~~~~~~~~~~~~~	~~Phone~~~
Attorneys for Petitioner:		
Jack D. Robinson Counsel of Record	Spies Powers & Robinson, P.C. Cherry Tower 950 South Cherry St., Suite 700 Denver, CO 80246 robinson@sprlaw.net	(303) 830-7090

Party name: Endrew F., a Minor, By and Through His Parents and Next Friends, Joseph F. and Jennifer F.

Jeffrey L. Fisher	Stanford Law School Supreme Court Litigation Clinic 559 Nathan Abbott Way Stanford, CA 94305-8610 jlfisher@law.stanford.edu	(650) 724-7081

Party name: Endrew F., a Minor, By and Through His Parents and Next Friends, Joseph F. and Jennifer F.

Attorneys for Respondent:

Neal Kumar Katyal
Counsel of Record
Hogan Lovells US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004
neal.katyal@hoganlovells.com
(202) 637-5600

Party name: Douglas County School District RE-1

Robert Sherman Ross Jr.
Douglas County School District
620 Wilcox Street
Castle Rock, CO 80104
robert.ross@dcsdk12.org
(303) 387-0275

Party name: Douglas County School District RE-1

W. Stuart Stuller
Caplan and Earnest LLC
1800 Broadway, Suite 200
Boulder, CO 80302
(303) 443-8010

Party name: Douglas County School District RE-1

Other:

Selene Almazan-Altobelli
Council of Parent Attorneys and Advocates
P.O. Box 6767
Towson, MD 21285
selene@copaa.org
(844) 426-7224

Party name: Council of Parent Attorneys and Advocates, et al.

William P. Bethke
Kutz & Bethke LLC
363 S. Harlan Street
Suite 104
Lakewood, CO 80226
wpbethke@lawkb.com
(303) 922-2003

Party name: National Center for Special Education in Charter Schools, et al.

John W. Borkowski
Husch Blackwell, LLP
120 South Riverside Plaza, Suite 2200
Chicago, IL 60606
john.borkowski@huschblackwell.com
(312) 655-1500

Party name: The Council of the Great City Schools

Andrew K. Cuddy
Cuddy Law Firm, P.C.
5693 South Street Road
Auburn, NY 13021
acuddy@cuddylawfirm.com
(315) 370-4020

Party name: The Coalition of Texans with Disabilities, et al.

Patricia Davis
Delaware Department of Justice
820 North French Street
Wilmington, DE 19801
PatriciaA.Davis@state.de.us
(302) 577-8400
Party name: Delaware, et al.

Ruthanne M. Deutsch
Deutsch Hunt, PLLC
300 New Jersey Ave., NW
Washington, DC 20001
rdeutsch@deutschhunt.com
(202) 868-6915
Party name: AASA, The School Superintendents Association, et al.

Irv Gornstein
Counselor to the Solicitor General
Department of Justice
Washington, DC
(202) 514-2201
Party name: United States

Marc A. Hearron
Morrison & Forester LLP
2000 Pennsylvania Avenue, NW Suite 6000
Washington, DC 20006
MHearron@mofo.com
(202) 778-1663
Party name: National Disability Rights Network, et al.

Matthew S. Hellman
Jenner & Block LLP
1099 New York Ave., N.W.
Suite 900
Washington, DC 20001
mhellman@jenner.com
(202) 639-6861
Party name: 118 Members of Congress

Stephen A. Miller
Cozen O'Connor
One Liberty Place
1650 Market Street, Suite 2800
Philadelphia, PA 19103
samiller@cozen.com
(215) 665-4736
Party name: National Association of State Directors of Special Education, in support of neither party

Francisco M. Negron Jr.
General Counsel
National School Boards Association
1680 Duke Street, FL 2
Alexandria, VA 22314
fnegron@nsba.org
(703) 838-6722
Party name: National School Boards Association, et al.

Alice M. O'Brien
National Education Association
1201 16th Street, N.W.
(202) 822-7035

Washington, DC 20036
aobrien@nea.org
Party name: The National Education Association

Aaron M. Panner — Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C. — (202) 326-7900
1615 M Street, N.W.
Suite 400
Washington, DC 20036-3215
apanner@kellogghansen.com
Party name: Former Officials of the U.S. Department of Education

Alan E. Schoenfeld — Wilmer, Cutler, Pickering, Hale & Dorr, LLP — (212) 937-7518
7 World Trade Center
250 Greenwich St.
New York, NY 10007
alan.schoenfeld@wilmerhale.com
Party name: Advocates for Children of New York, et al.

Jeffrey B. Wall — Acting Solicitor General — (202) 514-2217
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
SupremeCtBriefs@USDOJ.gov
Party name: United States

Gregory J. Wallance — Kaye Scholer LLP — (212) 836-8000
250 West 55th Street
New York, NY 10019
gregory.wallance@kayescholer.com
Party name: Autism Speaks and The Public Interest Law Center

Frederick R. Yarger — Solicitor General — (720) 508-6168
Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, CO 80203
fred.yarger@coag.gov
Party name: Colorado State Board of Education and Colorado Department of Education

ECORD AND BRIEFS

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IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Brian Wolfman
Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

Jack D. Robinson
Counsel of Record
SPIES, POWERS &
ROBINSON, P.C.
1660 Lincoln Street
Suite 2220
Denver, CO 80264
(303) 830-7090
robinson@sprlaw.net

QUESTION PRESENTED

What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Endrew F. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a) is published at 798 F.3d 1329. The opinion of the United States District Court for the District of Colorado (Pet. App. 27a) is unpublished but is available at 2014 WL 4548439. The opinion of the State of Colorado Office of Administrative Courts (Pet. App. 59a) is also unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on August 25, 2015. Pet. App. 1a. Petitioner's request for rehearing and rehearing en banc was denied on September 24, 2015. Pet. App. 86a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, requires that public schools receiving federal funds for special education services provide each child with a disability a "free appropriate public education." 20 U.S.C. § 1401(9). These special education services must be "provided in conformity with the individualized education program required under" the IDEA. *Id.*

STATEMENT OF THE CASE

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, public schools must provide children with disabilities a "free appropriate public education." The key mechanism by which schools meet this requirement is the individualized education program, or IEP. Each IEP must be reasonably calculated to confer an educational benefit on the child. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982).

Since the Court first described this requirement over thirty years ago, federal courts of appeals have become intractably divided over the level of educational benefit the Act demands. Some courts, including the Tenth Circuit below, hold that an IEP satisfies the Act if it provides a child with a just-above-trivial educational benefit, while others hold that the Act requires a heightened educational benefit. Resolving the conflict among the circuits will ensure that millions of children with disabilities receive a consistent level of education, while providing parents and educators much-needed guidance regarding their rights and obligations.

A. Legal Background

1. In 1972, aware that children with disabilities often were not afforded access to public schools, Congress conducted an investigation. It found that most children with disabilities "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" *Rowley*, 458 U.S. at 179 (alteration in original) (quoting H.R. Rep. No. 94-332, at 2 (1975)); *see also* Edwin W. Martin et al., *The*

Legislative and Litigation History of Special Education, The Future of Children (Spring 1996), at 25, 26-28.

As a result, in 1975, Congress passed the Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975). It later amended and renamed the law the Individuals with Disabilities Education Act (IDEA or "the Act"). Pub. L. No. 101-476, 104 Stat. 1103 (1990). Since then, Congress has amended and reauthorized the IDEA twice – in 1997 and in 2004. Pub. L. No. 105-17, 111 Stat. 37 (1997); Pub. L. No. 108-446, 118 Stat. 2647 (2004).

Under the Act, states provide children with disabilities a free appropriate public education (FAPE) in exchange for federal funds for special education programs. *Rowley*, 458 U.S. at 775.[1] To provide a FAPE, parents and public school educators collaborate to create annual IEPs "tailored to the unique needs" of each child with a disability. *Id.* at 181; *see also* 20 U.S.C. § 1414(b)(4), (d)(1)(B); 34 C.F.R. § 300.327.

Congress recognized, however, that "this cooperative approach would not always produce a

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[1] The Act defines a "free appropriate public education" as "special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title." 20 U.S.C. § 1401(9).

consensus." *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 368 (1985). To resolve disputes, the IDEA authorizes administrative and judicial review. 20 U.S.C. § 1415(f), (i)(2)(A). Either the school district or the child's parents may request a "due process hearing" and present the dispute to a hearing officer at a local or state education agency. 20 U.S.C. § 1415(f)(1)(A); *see Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 51 (2005). The hearing officer then decides whether the school district has met the Act's requirements, including whether it has provided the student with a FAPE. 20 U.S.C. § 1415(b)(6), (f)(1)(A).

An aggrieved party may seek review of the agency decision in state or federal court, which "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). When parents place their child in a private school at their expense, the IDEA entitles the parents to tuition reimbursement if the school district has failed to provide a FAPE and the private school provides the child with an education that is proper under the Act. *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993); *see* 20 U.S.C. § 1412(a)(10)(C)(ii).

2. a. This Court first examined the Act in 1982 in *Rowley*, 458 U.S. 176. There, the Court held that, to provide a FAPE, the Act does not require schools to maximize the potential of children with disabilities, *id.* at 189-90, because Congress had not intended to achieve "strict equality of opportunity or services" between children with and without disabilities, *id.* at 198. At the same time, the Court recognized that a child's IEP must be reasonably calculated to enable the child to receive educational benefit, *id.*

at 206-07, and thus acknowledged that an education that confers no educational benefit on children with disabilities could not fulfill the Act's goal of affording them access to public schools. But the Court expressly declined to specify what the level of benefit should be. *Id.* at 202.

b. Since *Rowley*, Congress has amended and reauthorized the IDEA twice – in 1997 and in 2004. Pub. L. No. 105-17, 111 Stat. 37 (1997); Pub. L. No. 108-446, 118 Stat. 2647 (2004).

The 1997 amendments elevated the IDEA's goals from guaranteeing access to public education to "ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1). In service of these goals, the amendments added specific requirements for schools, such as the inclusion of students with disabilities in statewide educational assessments. *Id.* § 1412(a)(16). The previous version of the Act, Congress explained, had been "successful in ensuring children with disabilities . . . access to a free appropriate public education." *Id.* § 1400(c)(3). Yet implementation had been "impeded by low expectations and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." *Id.* § 1400(c)(4). Thus, the 1997 amendments sought "to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (quoting S. Rep. No. 105-17, at 3 (1997)).

The 2004 amendments further increased goals for educating children with disabilities by requiring,

for example, that IEPs describe services for children over age fifteen that assist them in transitioning to post-secondary education, employment, and – as appropriate – independent living. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII).

B. Factual Background

Petitioner Endrew F. (Drew) was diagnosed at age two with autism, Pet. App. 3a, which affects eight percent of all children served by the IDEA.[2] Autism impairs Drew's "cognitive functioning, language and reading skills, and his social and adaptive abilities." *Id.* Because autism is one of the disabilities categorically covered by the IDEA, Drew is entitled to the Act's protections. 20 U.S.C. § 1401(3)(A).

Drew attended public school in respondent Douglas County (Colorado) School District from preschool through fourth grade and received an IEP from the school district each year. Pet. App. 3a-4a. In second and third grade, Drew began experiencing behavioral problems in school, such as yelling, crying, and dropping to the floor. *Id.* 63a-64a. These problems became more frequent and severe in fourth grade. *Id.* 66a-67a. Drew engaged in self-harming behaviors, such as head banging, and he regularly had to be removed from the classroom. *Id.* 61a, 66a. On at least two occasions, he ran away from school, and when he returned, he grew so agitated that he took off his clothing. *Id.* 66a-67a.

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[2] Nat'l Ctr. for Educ. Statistics, Digest of Educ. Statistics, *Table 204.30: Children 3 to 21 Years Old Served Under IDEA* (2013), http://1.usa.gov/14ddX3M.

The parties agree that Drew's "behavioral issues interfered with his ability to learn." Pet. App. 56a, 73a. And the district court recognized the school district's "inability to manage [his] escalating behavioral issues." *Id.* 58a. Moreover, Drew made "minimal progress" towards the goals listed on his fourth-grade IEP. *Id.* 49a. For example, that IEP stated that Drew "will learn his multiplication facts 6-10," which was updated in his proposed fifth-grade IEP to "he will learn his multiplication facts 6-12." *Id.* 50a.

Following Drew's behavioral deterioration and lack of academic progress, his parents rejected the IEP proposed for his fifth-grade year because it was mostly unchanged from the ineffective fourth-grade IEP. Pet. App. 4a, 15a. Given the school's failure to address Drew's needs, his parents notified the school district that they were withdrawing him from the public school and would be seeking tuition reimbursement. *Id.* 68a-69a. They then placed Drew in a private school that specializes in educating children with autism. *Id.* 4a. The parties agree that Drew's placement at his new school was appropriate under the Act, *id.* 5a, and that he has made "academic, social and behavioral progress" there, *id.* 29a.

C. Proceedings Below

1. Drew's parents filed a due process complaint in 2012 seeking reimbursement for the tuition at his new school. Pet. App. 59a-60a. They maintained that the IEP for Drew's fifth-grade year denied him a FAPE because it was not reasonably calculated to provide him with an educational benefit. *Id.* 15a, 76a. They pointed to his behavioral decline and to

the IEP itself, which included objectives very similar to those in past IEPs, on which he had made "little to no progress." *Id.* Reasoning that the IDEA is only "designed to provide a floor" of educational quality, *id.* 77a, the hearing officer determined that the school district had provided Drew with a FAPE because he had received "some" educational benefit while enrolled in the public school, *id.* 72a.

2. Drew's parents filed suit under the IDEA in the U.S. District Court for the District of Colorado, basing jurisdiction on 20 U.S.C. § 1415(i)(2)(A) and 28 U.S.C. § 1331. The district court agreed with the hearing officer. Pet. App. 27a-28a. The court reasoned that the "intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id.* 36a. The court thus found that because the administrative record showed some evidence of "minimal progress" on some of Drew's IEP goals, the school district had provided Drew a FAPE. *Id.* 49a.

The Tenth Circuit affirmed. In addressing the level of educational benefit required for a FAPE, Pet. App. 15a, the court held that an IEP must be reasonably calculated to guarantee "some" educational benefit, which it interpreted to be any educational benefit that is "more than *de minimis*," *id.* 16a (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009)). The Tenth Circuit acknowledged that "[s]everal circuits have adopted a higher standard." Pet. App. 17a. But it expressly rejected those holdings, reasoning that this Court's decision in *Rowley* required a lower standard.

Id. 16a-17a. In the Tenth Circuit's view, *Rowley*'s use of the phrase "some educational benefit" to describe what the IDEA requires pinpointed the precise level of benefit required, rather than simply serving as a placeholder for the issue the Court expressly declined to reach: "establish[ing] any one test for determining the adequacy of educational benefits." 458 U.S. at 202.

Applying its "more than *de minimis*" test to the facts here, the Tenth Circuit observed that this was "without question a close case." Pet. App. 23a. But the Tenth Circuit held that Drew's IEP was "substantively adequate" because he had made just-above-trivial academic progress. *Id.*

3. Petitioner sought rehearing and rehearing en banc. The Tenth Circuit denied these requests. Pet. App. 86a.

REASONS FOR GRANTING THE WRIT

The courts of appeals are in disarray over the level of educational benefit that school districts must confer on children with disabilities to provide them with a free appropriate public education under the IDEA. This Court should use this case – which cleanly presents the legal issue on a well-developed set of facts – to resolve the conflict over this important question.

I. The Courts Of Appeals Are In Disarray Over The Level Of Educational Benefit That School Districts Must Provide Under The IDEA.

In *Board of Education v. Rowley*, 458 U.S. 176, 202 (1982), this Court expressly declined "to establish any one test for determining the adequacy of

educational benefits conferred." And while *Rowley* explained that Congress intended to confer "some educational benefit" on children with disabilities, *id.* at 200, it also explained that Congress intended to make "access meaningful," *id.* at 192. Lower courts have since latched on to the terms "some" and "meaningful" from *Rowley* to establish standards of educational benefit that conflict with one another.

Two circuits hold that IEPs must be calculated to confer on students with disabilities a substantial educational benefit, which they refer to as a "meaningful educational benefit." Five other circuits expressly acknowledge their disagreement with this higher standard and hold that *Rowley* requires only a just-above-trivial educational benefit. Three circuits appear to apply the just-above-trivial standard but have not expressly rejected the higher standard. The Ninth Circuit is internally conflicted, with different panels aligning themselves with opposite sides of the circuit split. The D.C. Circuit has not described the required level of benefit.

A. The Conflict

1. *Substantial Benefit.* For over twenty-five years, the Third Circuit consistently has held that IEPs must be calculated to provide a meaningful educational benefit to children with disabilities, explaining that to provide "merely more than a trivial educational benefit does not meet the meaningful benefit requirement." *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 390 (3d Cir. 2006) (internal quotation marks omitted); *accord T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 & n.2 (3d Cir. 2000) (Alito, J.) (expressly rejecting the "more than trivial benefit" standard); *Polk v. Cent. Susquehanna Intermediate*

Unit 16, 853 F.2d 171, 178-85 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989).

The Sixth Circuit expressly agrees with the Third Circuit that the IDEA requires a heightened educational benefit. *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 862-63 (6th Cir. 2004) (citing several Third Circuit cases), *cert. denied*, 546 U.S. 936 (2005). In *Deal*, the Sixth Circuit observed that "[n]othing in *Rowley* precludes the setting of a higher standard than the provision of 'some' or 'any' educational benefit," *id.* at 863, as long as that standard does not require schools to maximize each child's potential, *id.* at 862. It then went on to explain that, particularly in light of the 1997 amendments, the IDEA aims to enable children with disabilities "to lead productive, independent, adult lives, to the maximum extent possible." *Id.* at 864 (quoting 1997 version of the IDEA).[3] The Sixth Circuit thus adopted a standard demanding substantial educational progress because schools "providing no more than *some* educational benefit could not possibly hope to attain" Congress's goals. *Id.*

2. *Just-Above-Trivial Benefit.*

a. Five courts of appeals have expressly rejected a higher standard, as adopted by the Third and Sixth Circuits, and hold that, under the IDEA, school districts need only provide "some" educational benefit

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[3] This portion of the IDEA quoted in *Deal* now appears in substantially identical form in 20 U.S.C. § 1400(c)(5)(A)(ii).

– a standard met when an IEP is calculated to confer a just-above-trivial benefit.

The Tenth Circuit's decision below is illustrative. It held that "the educational benefit mandated by IDEA must merely be 'more than de minimis.'" Pet. App. 16a-17a (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009)); *see also Sytsema ex rel. Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1313 (10th Cir. 2008). In so holding, it "explicitly rejected" the "Third Circuit's heightened 'meaningful benefit' standard." Pet. App. 19a.

The Fourth Circuit agrees. It recognizes that "[s]ome courts do explicitly hold that the IDEA as amended requires school districts to meet a heightened standard." *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015) (citing *N.B. v. Hellgate Elementary Sch. Dist. ex rel. Bd. of Dirs.*, 541 F.3d 1202, 1212-13 (9th Cir. 2008)). But the Fourth Circuit's own "standard remains the same as it has been for decades: a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial." *Id.* at 360.

The First Circuit likewise requires only that educational benefits be just above trivial. *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34-35 (1st Cir. 2012); *see also Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 23-24 (1st Cir. 2008). It has rejected the argument that the 1997 IDEA amendments raised the standard. *Lessard*, 518 F.3d at 27-28; *see also* Lester Aron, *Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Public Education After* Rowley*?*,

39 Suffolk U.L. Rev. 1, 14-15 (2005) (describing the First Circuit as "steadfastly refus[ing] to apply" the higher standard).

The Seventh and Eleventh Circuits have also expressly rejected the "more stringent test" that prevails in the Third and Sixth Circuits, *Todd v. Duneland Sch. Corp.*, 299 F.3d 899, 905 n.3 (7th Cir. 2002), and have held that a student who makes just more than trivial progress has received a FAPE. *M.B. ex rel. Berns v. Hamilton Se. Sch.*, 668 F.3d 851, 862 (7th Cir. 2011); *see also JSK by and through JK v. Hendry Cty. Sch. Bd.*, 941 F.2d 1563, 1572-73 (11th Cir. 1991) (rejecting a heightened benefit standard and noting that "[w]hile a trifle might not represent adequate benefits," "some benefit" is all that is required) (internal quotation marks omitted)).

b. Three other courts of appeals appear to apply the just-above-trivial standard but without expressly rejecting a higher standard.

The Second Circuit holds that the IDEA is satisfied when an IEP is reasonably calculated to produce "more than only trivial advancement." *P. ex rel. Mr. & Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 119 (2d Cir. 2008) (internal quotation marks omitted).

Although the Fifth Circuit has stated that "the educational benefit that an IEP is designed to achieve must be 'meaningful,'" *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997) (citing *Polk*, 853 F.2d at 182), *cert. denied*, 522 U.S. 1047 (1998), it has clarified that this simply precludes an IEP that would produce a "mere

modicum or *de minimis*" educational benefit. *Id.* (internal quotation marks omitted).

The Eighth Circuit likewise has held that a student who "enjoyed more than what [the court] would consider 'slight' or 'de minimis' academic progress" was not denied an educational benefit. *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 810 (8th Cir. 2011).

3. *Other Circuits.* The Ninth Circuit is internally conflicted, embracing different ends of the circuit split on different occasions. It has twice applied a heightened benefit standard. *M.M. v. Lafayette Sch. Dist.*, 767 F.3d 842, 852 (9th Cir. 2014); *N.B. v. Hellgate Elementary Sch. Dist. ex rel. Bd. of Dirs.*, 541 F.3d 1202, 1212-13 (9th Cir. 2008). The Ninth Circuit in *Hellgate* expressly aligned itself with the Sixth Circuit, holding that the 1997 amendments enhanced schools' obligations under the Act by requiring them to do more than simply "open the door" to children with disabilities. 541 F.3d at 1212-13 & n.3 (quoting *Rowley*, 458 U.S. at 192). But in *J.L. v. Mercer Island School District*, 592 F.3d 938 (9th Cir. 2009), the Ninth Circuit disagreed with *Hellgate* and adopted the lower standard, holding that Congress did not "abrogate[]" *Rowley* in 1997. *Id.* at 951 & nn.9-10; *accord Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1057 & n.2 (9th Cir. 2012).

The D.C. Circuit has not endorsed a specific level of benefit. Instead, it only echoes *Rowley*, holding that an IEP must be reasonably calculated to ensure "educational benefits." *Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015); *see also Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015).

B. The Circuit Split Is Ripe For Resolution.

The question presented has had sufficient time to percolate in the forty years since the passage of the original Act and in the decades since the enactment of key amendments in 1997 and 2004. Nearly every court of appeals has weighed in on the issue.

The answer to the question presented depends in part on an interpretation of this Court's decision in *Rowley*, making it unlikely that lower courts will resolve their disagreement without guidance from this Court. Several courts have interpreted *Rowley* to prescribe a lower standard and have refused to hold – absent direction from this Court – that the IDEA requires more. *See, e.g.*, *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 358-60 (4th Cir. 2015); *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 27-28 (1st Cir. 2008).

Moreover, without this Court's intervention, the educational benefit to which a child with a disability is entitled will continue to depend on the state in which he or she lives. Now, for instance, a child with autism is entitled to only a just-above-trivial educational benefit in New York, which would be insufficient to satisfy the IDEA just across the border in the New Jersey suburbs of New York City.

II. The Question Presented Is Important To Students With Disabilities, Their Families, And Schools.

Parents and educators together create 6.5 million IEPs annually, and each of these IEPs must comport with the FAPE standard. Nat'l Ctr. for Educ. Statistics, Digest of Educ. Statistics, *Table 204.30: Children 3 to 21 Years Old Served Under IDEA*

(2013), http://1.usa.gov/14ddX3M. To develop and administer these IEPs, all parties need certainty about their rights and obligations under the IDEA.

A. An Inconsistent Standard Is Untenable For All Parties.

Being the parent of a child with a disability involves serious emotional and practical challenges, and the process of developing an IEP is demanding. It involves collaboration to determine appropriate educational services, periodic student assessments, IEP team meetings, and, on occasion, dispute resolution. But every stage of the process is improved when parents have clarity about the educational benefit to which their child is entitled. With greater certainty, parents can better collaborate with the school and better advocate for their children. Moreover, in the rare circumstance where parents must consider placing their child in a different school – a decision with grave emotional and financial consequences – certainty is essential. Parents should be able to calculate the risk of unilateral action if they believe their child is not benefitting from his or her education. This Court can reduce the difficulty of the calculation by answering the question presented.

Similarly, school administrators "require a consistent objective standard" to efficiently provide education to children with disabilities. Amicus Brief for Nat'l Sch. Bds. Ass'n et al., *Deal v. Hamilton Cty. Dep't. of Educ.* (No. 05-55), 2005 WL 2176860, at *4 (2005). For this reason, the National School Boards Association and the American Association of School Administrators, representing "nearly 15,000 local school districts" and "over 14,000 local school system leaders," urged this Court to resolve the question

presented a decade ago. *Id.* at *1, *4. These amici recognized that a consistent standard would aid officials "on the front lines" in "provid[ing] the best education possible to all children in their care." *Id.* at *1, *3; *see also* Perry A. Zirkel, *Is It Time for Elevating the Standard for FAPE Under IDEA?*, 79 Exceptional Children 497, 497 (2013).

B. Deciding The FAPE Standard Will Make An Important Difference In Educating Children With Disabilities.

The substantial educational benefit standard, as adopted by the Third and Sixth Circuits, differs significantly in effect from the just-above-trivial standard followed by the Tenth Circuit below and other courts of appeals. The Tenth Circuit suggested that the difference between the standards may be largely semantic. Pet. App. 17a n.8. To be sure, some courts occasionally have used the terms "meaningful benefit" and "some benefit" to describe the same standard. *See D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34-35 (1st Cir. 2012); *Hjortness ex rel. Hjortness v. Neenah Joint Sch. Dist.*, 507 F.3d 1060, 1065 (7th Cir. 2007); *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 814 (8th Cir. 2011) (Bye, J., dissenting). But lower-court rulings demonstrate that the substantial benefit standard and the just-above-trivial standard have "produced vastly different results for students with disabilities." Scott F. Johnson, Rowley *Forever More? A Call for Clarity and Change*, 41 J.L. & Educ. 25, 25 (2012).

For example, in *J.L. v. Mercer Island School District*, 592 F.3d 938 (9th Cir. 2009), the district court had initially applied a heightened standard and held that the school district had denied a FAPE to the child in question. *Id.* at 946. The Ninth Circuit disagreed, holding that the district court was wrong to apply a heightened standard. *Id.* at 950-51. On remand, the district court reversed its previous decision and held that, under the lower standard, the school district had provided the child a FAPE. *J.L. v. Mercer Island Sch. Dist.*, No. C06-494MJP, 2010 WL 3947373, at *8 (W.D. Wash. Oct. 6, 2010).

Similarly, in *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238 (3d Cir. 1999), the Third Circuit ruled that the district court was wrong to apply the lower standard and remanded the case for further proceedings, indicating that it believed the outcome could change under the higher standard. *Id.* at 247-48; *accord Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184-86 (3d Cir. 1988) (holding that under the correct, higher standard summary judgment for school district could not be affirmed), *cert. denied*, 488 U.S. 1030 (1989).

Drew's case also illustrates that the difference between the standards will affect case outcomes. Directly after recounting the evidence and ruling for the school district under the lower standard, the court of appeals remarked that Drew's was "without question a close case." Pet. App. 23a. The Tenth Circuit thus likely would have reached a different result had anything more than a just-above-trivial benefit been required.

C. This Court Regularly Grants Review To Clarify The IDEA.

Since *Rowley*, this Court has recognized the IDEA's importance by repeatedly providing guidance on its proper operation. *See, e.g.*, *Winkelman ex rel. Winkelman v. Parma Cty. Sch. Dist.*, 550 U.S. 516 (2007) (parents' right to prosecute IDEA claims on their own behalf); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (entitlement to expert fees); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005) (burden of proof in administrative hearings); *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999) (entitlement to certain services for children with disabilities); *Honig v. Doe*, 484 U.S. 305 (1988) (breadth of provision authorizing child to "stay put" pending resolution of placement dispute).

On several occasions, this Court has also addressed issues related to tuition reimbursement under the IDEA. *See, e.g.*, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). Because whether the school district has provided a FAPE determines a parent's entitlement to tuition reimbursement, *see Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985), these decisions will be more accurately and uniformly applied if the Court resolves the question presented.

III. This Case Is An Excellent Vehicle For Resolving The Question Presented.

This case presents an ideal vehicle for this Court to resolve the circuit split and provide lower courts with guidance in applying the IDEA.

1. The Tenth Circuit's decision is final, and resolution of the question presented will likely be outcome determinative. If the Court holds that the Tenth Circuit applied the proper standard, Drew's case is over. On the other hand, it is unlikely that Drew's IEP would have satisfied the higher, substantial educational benefit standard. As noted earlier, the Tenth Circuit stated that whether Drew received even a nontrivial benefit was a "close case," Pet. App. 23a, presumably because his fifth-grade IEP was nearly identical in substance to his fourth-grade IEP, *id.* 50a, and his fourth grade IEP had abandoned many of Drew's prior educational objectives due to his lack of progress, *id.* 44a.

If this Court determines a higher standard applies, it could decide whether Drew's fifth-grade IEP met that standard on facts already fully developed below – as it did in *Rowley* – or it could remand to allow the lower courts to apply the new standard.

2. By contrast, the two petitions for certiorari raising the proper standard for FAPE that the Court has received in the past decade were poor vehicles for review. *Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005), involved a non-final decision, *id.* at 865, and respondent had won below on other grounds that could have provided all the relief to which he was entitled, *id.* at 859-61. *See* Brief in Opposition, *Hamilton Cty. Dep't. of Educ. v. Deal* (No. 05-55), 2005 WL 2204186, at *29-30 & n.13 (2005). And in *Thompson R2-J Sch. District v. Luke P.*, 540 F.3d 1143 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009), the Tenth Circuit did not even

contemplate choosing between different standards of educational benefit. *Id.* at 1150-52.

IV. The Tenth Circuit Erred In Adopting A Just-Above-Trivial Standard.

The IDEA seeks to provide children with genuine access to public education. To meet this goal, school districts must provide a substantial educational benefit to children with disabilities, as the Third and Sixth Circuits have held. School districts that provide only a just-above-trivial benefit cannot achieve this objective.

1. The IDEA requires that children with disabilities be provided a "free appropriate public education." 20 U.S.C. § 1401(9). The meaning of the word "appropriate" is naturally informed by the Act's more particular requirements and purposes. In 1982, as noted, this Court expressly declined to decide what level of educational benefit the Act requires. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 202 (1982). At the same time, the Court recognized that the Act demands not only creation of IEPs and simple access to public schools for children with disabilities, but also that IEPs provide enough substantive educational benefit "to make such access meaningful." *Id.* at 192.

What is more, the Act has evolved significantly since its enactment. With the 1997 amendments, Congress acknowledged that prior versions of the Act had succeeded in "ensuring children with disabilities and the families of such children access to a free appropriate public education." 20 U.S.C. § 1400(c)(3). But Congress recognized that education of children with disabilities continued to be "impeded by low

expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning." *Id.* § 1400(c)(4).

As a result, the 1997 amendments shifted the Act's focus from simply guaranteeing access to education to "ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1). This Court has expressly recognized this "greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (quoting S. Rep. No. 105-17, p. 5 (1997)).

Consistent with this shift, the 1997 and 2004 amendments added several requirements to help children with disabilities succeed in school and beyond. For example, schools must produce progress reports for children with disabilities with the same frequency as they issue report cards for students without disabilities and must document both "academic achievement and functional performance." 20 U.S.C. § 1414(d)(1)(A)(i)(III), (VI)(aa) (added in 2004). Schools must include students with disabilities in statewide assessments that apply to students without disabilities unless they can justify the decision to give students with disabilities alternative assessments. *Id.* §§ 1412(a)(16) (added in 1997), 1414(d)(1)(A)(i)(VI)(bb) (added in 2004). Services also must be based on peer-reviewed research whenever practicable. *Id.* § 1414(d)(1)(A)(i)(IV) (added in 2004). And, for children over age fifteen, IEPs must describe the transition services necessary to prepare them for

post-secondary education, employment, and – as appropriate – independent living. *Id.* § 1414(d)(1)(A)(i)(VIII) (added in 2004).

Since 1997, the Department of Education has issued regulations interpreting these requirements. For instance, the Department requires schools to adapt instruction to ensure "that the child can meet the educational standards" that "apply to *all* children" – both those with disabilities and those without. 34 C.F.R. § 300.39(b)(3) (emphasis added). In addition, schools must provide students "an equal opportunity for participation" in extracurricular services and activities, which include athletics, clubs, and student employment. *Id.* § 300.107 (2015).

Moreover, in a recent "Dear Colleague" letter, the Department of Education urged state and local education agencies to ensure "that all children, including children with disabilities, are held to rigorous academic standards and high expectations." U.S. Dep't of Educ., Dear Colleague Letter: Clarification of FAPE and Alignment with State Academic Standards 1 (Nov. 16, 2015), http://1.usa.gov/1MkxyAE. Specifically, the letter expressed concern that low expectations – especially in the form of below grade-level content standards – are impeding the success of children with disabilities. *Id.* Applying equal standards to all children, the Department said, will promote "high-quality instruction" for children with disabilities and "prepare them for college, careers and independence." *Id.* at 3-4.

The Tenth Circuit's just-above-trivial standard is inconsistent with these goals and perpetuates the "low expectations" for children with disabilities that

Congress has found impedes their progress. 20 U.S.C. § 1400(c)(4). The IDEA requires that IEPs be calculated to provide a substantial educational benefit to children with disabilities – not just a non-trivial benefit – to achieve the IDEA's goals of equality of opportunity, full participation, and improved student performance. *See Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 864 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005); *see also N.B. v. Hellgate Elementary Sch. Dist. ex rel. Bd. of Dirs.*, 541 F.3d 1202, 1213 nn.2-3 (9th Cir. 2008).

2. *Rowley* is consistent with a substantial educational benefit standard.

In *Rowley*, this Court held that the Education for All Handicapped Children Act did not require the school district to provide a deaf student with sign language interpreter services, given that she was "perform[ing] better than the average child in her class," was "advancing easily from grade to grade," was "remarkably well-adjusted," 458 U.S. at 185 (quoting district court findings), and interacted and communicated well with her classmates, *id.* at 185, 210.

Understood in this context, the Court held that a standard requiring school districts to maximize a child's potential – which had been applied by the courts below – was not supported by the Act. *Rowley*, 458 U.S. at 189-90. But it also recognized that an education that confers no benefit at all cannot be sufficient. *Id.* at 200-01. Thus, the Court's statement that the Act demands "some educational benefit," *id.* at 200 – pointed to by some courts of appeals as support for a lower standard – did not prescribe a required amount of benefit. It only restated the

Court's determination that a child must actually receive a "*benefit* from special education," rather than none at all. *Id.* at 201. Thus, the situation here, post-*Rowley*, is similar to a situation in which the Court has held simply that a person is entitled to substantive legal protection and left open the question of what level of protection is appropriate.[4]

Indeed, as noted above, *Rowley* itself was not attempting "to establish any one test for determining the adequacy of educational benefits." 458 U.S. at 202. It "confine[d its] analysis" to the situation before it, in which a child was already "performing above average in the regular classrooms." *Id.* For these reasons, courts of appeals that maintain a just-above-trivial standard because they interpret *Rowley* as specifying this standard are incorrect.

Finally, although *Rowley* declined to interpret the Act as requiring equality of educational opportunity for children with disabilities, 458 U.S. at 198-99, lower courts' attempts to read this view as supporting the lower standard have since been foreclosed by Congress. The IDEA now seeks to ensure "equality of opportunity" for children with disabilities. 20 U.S.C. § 1400(c)(1). That express

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[4] *See, e.g., United States v. Jones*, 132 S. Ct. 945, 954 (2015) (holding that the Government's placement on a vehicle of a GPS device is a Fourth Amendment "search," but leaving open the question whether probable cause and a warrant are required); *cf. Heller v. Doe*, 509 U.S. 312, 319 (1993) (deciding equal protection challenge to a statutory classification under rational-basis review, but leaving open the question whether the classification is subject to heightened scrutiny because the issue was not properly presented).

statutory goal underscores the conclusion that a school district cannot provide children with disabilities a free appropriate public education unless it seeks to provide them with a substantial educational benefit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Brian Wolfman
Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

Jack D. Robinson
Counsel of Record
SPIES, POWERS &
ROBINSON, P.C.
1660 Lincoln Street
Suite 2220
Denver, CO 80264
(303) 830-7090
robinson@sprlaw.net

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APPENDIX

APPENDIX A

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United States Court of Appeals Tenth Circuit
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Elisabeth A. Shumaker
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PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ENDREW F., a minor, by and through his parents and next friends, JOSEPH F., and JENNIFER F., Plaintiffs-Appellants, v. DOUGLAS COUNTY SCHOOL DISTRICT RE-1, Defendant-Appellee.	No. 14-1417

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. NO. 1:12-CV-02620-LTB)

Jack D. Robinson, Spies, Powers & Robinson, P.C., Denver, Colorado, for Appellants.

Robert S. Ross, Jr., Douglas County School District Re-1, Castle Rock, Colorado, for Appellee.

Before **HARTZ**, **TYMKOVICH**, and **PHILLIPS**, Circuit Judges.

TYMKOVICH, Circuit Judge.

Federal law requires public schools to provide students with disabilities a free and appropriate education. If a school cannot meet the educational needs of a disabled student, the student's parents can place the child in private school and seek reimbursement of tuition and related expenses. In this case, the parents of an autistic child withdrew him from the Douglas County School District because they believed his educational progress was inadequate. They later sought reimbursement that the District challenged. The District's denial of reimbursement was upheld after a due process hearing in administrative court, and that determination was also upheld in federal district court.

We affirm. We find sufficient support in the record to affirm the findings of the administrative law judge that the child received some educational benefit while in the District's care and that is enough to satisfy the District's obligation to provide a free appropriate public education. Accordingly, under Tenth Circuit precedent, the District did not violate the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* (IDEA), and is not required to reimburse the cost of the student's private-school education.

I. Background

The IDEA makes federal education funding conditional on the states' provision of a "free appropriate public education" (FAPE) to all children with disabilities. *See* 20 U.S.C. § 1412(a)(1)(A). The central mechanism by which the Act ensures a FAPE

for each child is the development and implementation of an individualized education program (IEP). *See id.* § 1401(9) (defining a FAPE as "special education and related services that . . . are provided in conformity with the [IEP] required under section 1414(d)"); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 368 (1985) ("The *modus o erandi* of the Act is the . . . [IEP]." (internal quotation marks omitted)). An IEP is "a detailed written document which describes the student's educational goals for an academic year and establishes a plan to achieve those goals." *Jefferson Cty. Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B.*, 702 F.3d 1227, 1230 (10th Cir. 2012). The Act put in place detailed procedural requirements by which a child's IEP must be created and maintained. *See* 20 U.S.C. § 1414(d)(1)(A)(i). Beyond the procedure required, however, Congress "left the content of th[e] programs entirely to local educators and parents." *Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1151 (10th Cir. 2008). The Act does not prescribe the substantive level of achievement required for an appropriate education. Rather, the substantive adequacy of an IEP is determined by a standard articulated by the Supreme Court: the IEP must be "reasonably calculated to enable the child to receive educational benefits." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982).

The plaintiff-appellant, Endrew F. (Drew), was diagnosed with autism at the age of two and with attention deficit/hyperactivity disorder a year after that. Drew's autism affects his cognitive functioning, language and reading skills, and his social and adaptive abilities. Drew attended Douglas County

schools from preschool through fourth grade. During that time, he received special-education services, including IEPs tailored to meet his unique needs.

At the conclusion of an especially rocky fourth-grade year, Drew's parents, Joseph and Jennifer F., decided Drew was not making any meaningful progress and rejected the IEP proposed by the District for fifth grade. As a result, they withdrew him from the District and instead enrolled him at Firefly Autism House, a private school that specializes in educating autistic children. The parents then turned to the District for reimbursement of Drew's private-school tuition and related expenses. *See* 20 U.S.C. § 1412(a)(10)(C)(ii). They contended the reimbursement was due because the District had failed to provide Drew with a FAPE.

After a three-day administrative due process hearing, *see id.* § 1415(f), an administrative law judge (ALJ) denied the request finding the District had provided Drew with a FAPE. The parents next filed suit in federal court for judicial review of the ALJ's decision. *See id.* § 1415(i)(2)(A). The district court affirmed.

II. Discussion

Drew's parents contend they are entitled to tuition reimbursement under the IDEA and that the ALJ and the district court failed to recognize the District's procedural and substantive violations of the Act. After describing the tuition reimbursement provisions of the IDEA, we consider the District's denial of reimbursement and ask whether the procedural and

substantive violations alleged by the parents resulted in the denial of a FAPE.

A. Tuition Reimbursement Under the IDEA

The IDEA allows parents who believe their children are not receiving a FAPE in state schools an option. Those parents may pull their children from public school, enroll them in private school, and then request reimbursement from the school district. *Id.* § 1412(a)(10)(C)(ii); *see also Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 12–13 (1993); *Burlington*, 471 U.S. at 370.[1]

Parents who take unilateral action, however, "'do so at their own financial risk.'" *Jefferson Cty.*, 702 F.3d at 1232 (quoting *Florence Cty.*, 510 U.S. at 15). If a school district denies the parents' request for reimbursement, a court may order reimbursement only if (1) "'the public placement violated IDEA'" and (2) "'the private school placement was proper under the Act.'" *Id.* (quoting *Florence Cnty.*, 510 U.S. at 15). There is no contention here that Drew's placement at Firefly is not permissible under the Act. The only issue

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[1] Section 1412 provides:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a [FAPE] available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412(10)(C)(ii); *see also* 34 C.F.R. § 300.148(c).

is whether the District violated the IDEA by failing to provide Drew with a FAPE.[2]

In determining whether a school district provided a student with a FAPE, we follow a two-step analysis and ask (1) whether the district complied with the Act's procedural requirements, and (2) whether the IEP developed by those procedures is substantively adequate such that it is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207; *see also O'Toole ex rel. O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 701 (10th Cir. 1998). If a district has met both the procedural and substantive requirements, it "has complied with the obligations imposed by Congress and the courts can require no more." *Rowley*, 458 U.S. at 207.

We review the district court's judgment de novo, applying the same standard of review as the district court. *Jefferson Cty.*, 702 F.3d at 1232. In reviewing an administrative decision in the IDEA context, we apply a modified de novo standard of review, meaning we give "'due weight'" to the administrative proceedings and consider the ALJ's factual findings to

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[2] A school district may also violate the Act by failing to provide a child with an education in the least restrictive environment. *See Thompson*, 540 F.3d at 1148; *see also L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 975 n.13 (10th Cir. 2004) ("The IDEA requires *both* that the child be provided a FAPE *and* that such a FAPE be provided in an LRE [least restrictive environment] to the maximum extent appropriate."). Drew and his parents do not raise this type of claim on appeal and we do not consider it.

be prima facie correct. *Id.* (quoting *Garcia v. Bd. of Educ.*, 520 F.3d 1116, 1125 (10th Cir. 2008)).

B. Application

The parents raise both procedural and substantive challenges. They first allege two procedural deficiencies: (1) the District's failure to provide them with adequate reporting on Drew's progress during the school years, and (2) the District's failure to conduct a proper assessment of Drew's behavior and put in place an adequate plan to address his particular behavioral needs.

Their substantive challenge also proceeds in two parts. First, the parents argue the district court and the ALJ utilized the wrong legal standard in evaluating the substantive sufficiency of the rejected fifth-grade IEP. Second, they argue the ALJ and the district court erred in concluding the IEP was substantively adequate because (1) Drew made no measurable progress on the goals set in his past IEPs, and (2) there was no consideration of Drew's escalating behavioral problems.

We consider each in turn.

1. Procedural Challenges

The Supreme Court has emphasized the importance of the procedural safeguards contained in the Act, explaining that "[w]hen the elaborate and highly specific procedural safeguards embodied in [the IDEA] are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, . . . the importance Congress attached to these procedural safeguards cannot be gainsaid." *Rowley*,

458 U.S. at 205. But merely identifying a procedural deficiency does not automatically entitle a family to relief. *See Systema ex rel. Systema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1313 (10th Cir. 2008); *O'Toole*, 144 F.3d at 701. A school district's procedural failure must have effectively denied the child a FAPE either because it (1) "impeded the child's right to a [FAPE]," (2) "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' child," or (3) "caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E); *see also Garcia*, 520 F.3d at 1126 ("[O]ur precedent hold[s] that procedural failures under IDEA amount to substantive failures only where the procedural inadequacy results in an effective denial of a FAPE.").

Drew's parents contend they meet this standard because the District's alleged procedural violations impeded their ability to participate in informing Drew's education and denied Drew his right to adequate educational benefits.

a. Progress Reporting

The first procedural deficiency alleged by the parents is the District's failure to adequately report Drew's progress toward the annual goals and objectives listed in his IEPs. They contend the lack of progress reporting deprived them of meaningful participation in Drew's education. We agree with the District that, even assuming a procedural violation,[3]

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[3] The Act requires that the IEP include "a description of how the child's progress toward meeting the annual goals . . . will be measured and when periodic reports on the progress the child is

the District's progress reporting did not result in the denial of a FAPE.

As an initial matter, the District concedes that the progress reporting on Drew's IEPs could have been more robust. As the ALJ found, Drew's IEPs contain little or no progress reporting or measurement data and where progress was reported, it was "lacking in detail" or limited to "conclusory statements about whether [Drew] was on track to meet the expectations of the plan and whether the objective had been completed or would be continued." R., Vol. I at 9, 15. But the District contends what was reported was sufficient for the parents to assess Drew's progress and that whatever deficiencies existed, the parents' involvement in Drew's education did not suffer as a result.

Drew's parents were not absentee caretakers; they were just the opposite. The ALJ found that, in addition to the progress reporting that was included on Drew's IEPs, there was substantial evidence of the parents' awareness of Drew's progress and of their active participation in his education. For instance, the ALJ found the parents were "in constant communication" with Drew's special education teacher both through face-to-face meetings and a "back-and-forth notebook," which was used to inform the parents of what occurred

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making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided." 20 U.S.C. § 1414(d)(1)(A)(i)(III); *see also* 34 C.F.R. § 300.320(a)(3)(i). But neither the IDEA nor its implementing regulations actually prescribe the frequency or the content of progress reports.

at school and to inform Drew's teacher of what happened in the home. *Id.* at 16; *see also id.* at 96 (D. Ct. Op. at 23) (finding "significant informal communication with the parents as to [Drew's] progress"). Drew's teacher testified at the hearing that she sent home quarterly progress reports (concurrent with the timing of report cards). The parents also received Drew's draft IEPs in advance of each team meeting and were active in suggesting what goals and objectives should be modified, added, or dropped from Drew's IEPs. Accordingly, the ALJ did not err in concluding the gaps in the reporting on some of Drew's IEPs did not inhibit the parents from meaningful participation in Drew's education.

The parents point us to a case where a district court concluded that a school district's reporting deficiencies amounted to a substantive denial of a FAPE. *See Escambia Cty. Bd. of Educ. v. Benton*, 406 F. Supp. 2d 1248 (S.D. Ala. 2005). In that case, however, the student's IEPs not only lacked progress reporting, but also included annual goals and objectives that were alternatively described by the district court as "mushy, ambiguous, [and] unquantifiable" and "[v]ague and unmeasurable." *Id.* at 1274–75. The critical distinction between *Escambia* and Drew's case is that the hearing officer there "plainly found adverse impacts" caused by the procedural defects on the IEP team's ability to make necessary adjustments and interventions in the child's education. *Id.* at 1273–74. Here, by contrast, the ALJ found the deficiencies in the District's reporting did not have an adverse impact on the IEP team's ability to craft and implement Drew's IEPs.

In reaching this conclusion, we do not downplay the importance of regular and diligent progress reporting on IEPs. In a system built on the continuous revision of individualized plans meant to address disabled students' unique needs, data on what is or is not working for a student is crucial. *See* Mitchell L. Yell et al., *Individualized Education Programs and Special Education Programming for Students with Disabilities in Urban Schools*, 41 Fordham Urb. L.J. 669, 709 (2013) ("Appropriate monitoring of a student's progress . . . is essential because without measuring a student's progress, it will be impossible to determine if the student's program is working."). Thus, while we do not endorse the District's reporting in this case, without evidence that there was an impact on Drew's education, we cannot say he was effectively denied a FAPE.

In short, the record supports the ALJ's conclusion the parents were aware of Drew's progress and fully participated in his education.

b. Behavioral Assessment

The parents' second procedural argument is that the District's handling of Drew's behavioral needs amounted to a substantive denial of a FAPE. Specifically, they criticize (1) the District's failure to conduct a functional behavior assessment (FBA) before implementing a behavior plan for Drew, and (2) even absent the FBA, the District's failure to put in place an

appropriate behavioral intervention plan (BIP) to address Drew's increasing behavioral issues.[4]

Drew exhibited multiple behaviors that inhibited his ability to access learning in the classroom. In the past, he has climbed over furniture and other students, hit things, screamed, ran away from school, and twice removed his clothing and gone to the bathroom on the floor of the classroom. Drew's second and fourth grade IEPs contained behavior plans (although they are somewhat ambiguously marked "draft"). These plans identified some of Drew's problem behaviors and possible ways to manage and reduce those behaviors. The school was also in regular contact with the parents regarding Drew's behavior.

Despite the school's prior attempts to manage his behavior, during Drew's fourth-grade year his behaviors increased to such a degree that the school decided to go back to the drawing board and rework their approach. Drew's special education teacher kept notes on, and anecdotal data of, Drew's behavior in an effort to pinpoint Drew's triggers. The District also scheduled an autism specialist and a behavioral specialist to come in and meet with Drew's IEP team to put a new behavioral plan in place. The parents did

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[4] An FBA "identif[ies] the purpose—and more specifically the function—of problem behaviors by investigating the preexisting environmental factors that have served the purpose of these behaviors." Perry A. Zirkel, *Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 Seattle U. L. Rev. 175, 175 (2011). FBAs are often completed prior to and become the basis of a student's BIP, which is the "concrete plan of action for reducing problem behaviors." *Id.*

not attend the meeting as they pulled Drew from the District before its scheduled date.

Drew's mother testified that the escalation of Drew's behavior left them with what they felt was one choice—to place Drew in a different learning environment. But as a matter of procedure, the District did not violate any provision of the IDEA or its implementing regulations. The Act provides that in developing and revising a student's IEP, the IEP team must, "in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i); *see also* 34 C.F.R. § 300.324(a)(2)(i). The requirement is merely to "*consider* the use" of the listed behavioral interventions. *See* Perry A. Zirkel, *Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 Seattle L.R. 175, 186 (2011) (noting the operant verb is "to consider," and not "to develop or implement"). The statute only *requires* school districts (and even then, only "as appropriate") to conduct an FBA or to implement a behavioral plan if there is a disciplinary change in placement of the student.[5] *See*

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[5] State law often goes further than the IDEA with respect to when FBAs and BIPs are required. *See, e.g., T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 169 (2d Cir. 2014) ("New York state regulations go beyond this floor set by the IDEA; they require a school district to conduct a full FBA for a student who exhibits behavior that impedes learning, and to develop a BIP to address that behavior."). And school districts must comply with state educational standards that are not inconsistent with federal standards. *See O'Toole*, 144 F.3d at 698. Drew and his parents

20 U.S.C. § 1415(k)(1)(D)(ii) ("A child with a disability who is removed from the child's current placement . . . shall . . . receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur."); *see also Park Hill Sch. Dist. v. Dass*, 655 F.3d 762, 766 (8th Cir. 2011) ("The IDEA only *requires* that an IEP include . . . a 'behavioral intervention plan' in limited circumstances not present in this case."); *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 25 (1st Cir. 2008) ("The IDEA only requires a behavioral plan when certain disciplinary actions are taken against a disabled child."); *Alex R. ex rel. Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist. #221*, 375 F.3d 603, 614 (7th Cir. 2004); Susan C. Bon & Allan G. Osborne, Jr., *Does the Failure to Conduct an FBA or Develop a BIP Result in a Denial of a FAPE Under the IDEA?*, 307 Educ. L. Rep. 581, 581 (2014). And even where an FBA or BIP is required, the IDEA does not impose any substantive requirements as to what they must include. Bon & Osborne, *supra*, at 583.

Drew was never subject to a disciplinary change in placement. Thus, even though the record establishes that Drew is "a child whose behavior impedes the child's learning or that of others" all that was required by the Act was for the District to "consider" behavioral intervention. 20 U.S.C. § 1414(d)(3)(B)(i). The record is filled with examples of the District's consideration of Drew's behavioral issues. Thus, the District complied

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make no argument based on Colorado law and we do not consider it.

with federal law. *See R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813 (5th Cir. 2012) (finding the school district complied with federal law where the district considered behavioral interventions and the child had not been removed from her placement due to disciplinary infractions); *Lessard*, 518 F.3d at 26 (same).

In sum, we find no procedural defect that amounted to a denial of a FAPE.

2. Substantive Challenge

Because neither of the parents' procedural arguments establish a violation of the Act, we must resolve their argument that the District's proposed fifth-grade IEP was substantively inadequate. The parents submit it was not adequate for two reasons. First, because the fifth-grade IEP was similar in all material respects to Drew's past IEPs, they contend that Drew's lack of progress on the objectives listed in those IEPs is dispositive of whether the rejected IEP was reasonably calculated to provide Drew educational benefit. Second, the parents contend the ALJ failed to consider the impact of Drew's escalating behavioral problems in determining whether the IEP was reasonably calculated to provide Drew an educational benefit.

Before reaching these arguments, we must first address the parents' contention that our circuit recently shifted the standard with which we measure the substantive adequacy of an IEP—that is, whether the IEP is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207. Specifically, they argue our opinion in *Jefferson*

County School District v. Elizabeth E., 702 F.3d 1227 (10th Cir. 2012) abandoned the "some educational benefit" standard previously articulated in our cases (and applied by the ALJ and the district court) in favor of a heightened "meaningful educational benefit" standard.

A brief detour in the case law explains the argument and its resolution. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court, in considering the statutory precursor to the IDEA, the Education of the Handicapped Act (EHA), determined that Congress's aim had been to set a "basic floor of opportunity" for disabled children by "providing individualized services sufficient to provide every eligible child with '*some* educational benefit.'" *Thompson*, 540 F.3d 1143 at 1149 (quoting *Rowley*, 458 U.S. at 200). Congress did not "'guarantee educational services sufficient to maximize each child's potential.'" *Id.* (quoting *Rowley*, 458 U.S. at 198) (internal quotation marks omitted); *see also Rowley*, 458 U.S. at 192 (stating that "the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside"). This circuit has long subscribed to the *Rowley* Court's "some educational benefit" language in defining a FAPE, *see O'Toole*, 144 F.3d at 707-08, and interpreted it to mean that "the educational benefit mandated by IDEA must merely be 'more than *de minimis*.'" *Thompson*, 540 F.3d at 1149 (quoting *Urban ex rel. Urban v. Jefferson Cty. Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996)).

Several circuits have adopted a higher standard—requiring a "meaningful educational benefit." *See, e.g.*, *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004); *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 808–09 (5th Cir. 2003); *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988). These courts have relied on other language in *Rowley*[6] as well as language in post-*Rowley* amendments to the IDEA, which some have interpreted as promising disabled children a higher measure of achievement.[7] This circuit, however, has continued to adhere to the *Rowley* Court's "some educational benefit" definition of a FAPE.[8] In

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[6] The *Rowley* Court also said, "By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access *meaningful*." 458 U.S. at 192 (emphasis added).

[7] In the wake of post-*Rowley* amendments to the IDEA in 1997 and 2004, many commentators argued for the adoption of a higher substantive standard. *See* Perry A. Zirkel, *Have the Amendments to the Individuals with Disabilities Education Act Razed* Rowley *and Raised the Substantive Standard for "Free Appropriate Public Education"?*, 28 J. Nat'l Ass'n Admin. L. Judiciary 396, 402–03 (2008); Perry A. Zirkel, *Is it Time for Elevating the Standard for FAPE Under IDEA?*, 79 Exceptional Child 497, 498–99 (2013).

[8] Although the "meaningful benefit" standard is purportedly higher than the "some benefit" standard, the difference between them—that is, how much *more* benefit a student must receive for it to be meaningful—is not clear. *Systema*, 538 F.3d at 1313 n.7 ("Admittedly, it is difficult to distinguish between the requirements of the 'some benefit' and the 'meaningful benefit' standards."). *Compare* Scott F. Johnson, Rowley *Forever More? A*

Thompson, we found it inconsequential that *Rowley* had analyzed the statutory precursor to the IDEA because Congress has maintained the same statutory definition of a FAPE from its initial inception in the EHA and in each subsequent amendment to the Act. *See* 540 F.3d at 1149 n.5. We also noted that subsequent Supreme Court decisions have cited *Rowley*'s definition of a FAPE approvingly. *See id.* (citing *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525 (2007)); *see also* Ronald D. Wenkart, *The* Rowley *Standard: A Circuit by Circuit Review of How* Rowley *Has Been Interpreted*, 247 Educ. L. Rep. 1, 5–6

Call for Clarity and Change, 41 J.L. & Educ. 25, 27 (2012) (arguing that "[u]sing one standard or the other can dramatically affect the outcome of a case and the services provided to a student"), *with* Andrea Kayne Kaufman & Evan Blewett, *When Good Is No Longer Good Enough: How the High Stakes Nature of the No Child Left Behind Act Supplanted the* Rowley *Definition of a Free Appropriate Public Education*, 41 J.L. & Educ. 5, 20–21 (2012) (noting it is "unclear whether or not there is any real difference . . . other than semantics"), *and* Ronald D. Wenkart, *The* Rowley *Standard: A Circuit by Circuit Review of How* Rowley *Has Been Interpreted*, 247 Educ. L. Rep. 1, 4 (2009) (arguing that "the use of different terminology does not appear to create different substantive standards or lead to different results").

Although commentators agree there is a circuit split on the applicable standard, which circuit falls on which side varies depending on which commentator you read. *Compare* Kaufman & Blewett, *supra*, at 20 (stating that the majority of the circuit courts adhere to the "some educational benefit" standard), *and* Wenkart, *supra*, at 1 (same), *with* Scott Goldschmidt, *A New Idea for Special-Education Law: Resolving the "Appropriate" Educational Benefit Circuit Split and Ensuring a Meaningful Education for Students with Disabilities*, 60 Cath. U. L. Rev. 749, 751 (2011) (stating that "a slight majority" of circuits "requir[e] a heightened-educational-benefit standard").

(2009) (noting subsequent Supreme Court cases have not questioned or overruled the *Rowley* standard). And in *Systema ex rel. Systema v. Academy School District No. 20*, we explicitly rejected an argument that this court should follow the Third Circuit's heightened "meaningful benefit" standard because as we explained there, this circuit applies "the 'some benefit' standard the Supreme Court adopted in *Rowley*." 538 F.3d at 1313 & n.7 (citing *O'Toole*, 144 F.3d at 699).

The parents agree with us up to this point, but contend that our more recent opinion in *Jefferson County* marked a "fundamental shift" in circuit precedent and adopted the "meaningful educational benefit" standard. Aplt. Br. at 12. Relying on *Jefferson County*, they ask that we now expressly overturn *Thompson R2-J School District v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143—the case relied on by the ALJ and the district court for the "some educational benefit" standard. That we cannot do. We are bound by *Thompson* (and the cases preceding it) "absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court." *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000).

Nor do we see, in any event, evidence that the *Jefferson County* panel intended to abandon the "some educational benefit" standard. The issue in *Jefferson County* was not how much benefit to a child must be demonstrated to surpass the substantive threshold of a FAPE. In fact, the hearing officer in that case found the school district failed to provide the student with a FAPE and the district did not appeal that finding before the ALJ, the district court, or on appeal to this

court. Thus, we had no reason to discuss the proper standard to apply in making that determination.

The issue was how—absent a FAPE—to determine if a child's placement in a private, residential facility is proper under the Act and thus reimbursable. Much of the opinion was spent outlining the approaches from other circuits—as is relevant here, one from the Third Circuit and one from the Fifth. As referenced above, both the Third and the Fifth Circuits define a FAPE to require the conferral of a meaningful educational benefit. The three appearances of the phrase "meaningful educational benefit" in the majority opinion of *Jefferson County* is a reflection of the effort spent recounting the law of those circuits and not a discrete attempt to depart from this circuit's well-established definition of a FAPE. The first appearance of "meaningful educational benefit," for instance, appears within a quote from a Fifth Circuit opinion. 702 F.3d at 1234 (quoting *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 299 (5th Cir. 2009)). The second and third instances do recount that the IDEA requires "that all children, no matter how disabled, receive some meaningful educational benefit," *id.* at 1238, but that language is supported by both a cite to a Third Circuit opinion and a citation to *Thompson*. In our view, those citations—one to a circuit following a "meaningful educational benefit" standard and one following the "some educational benefit" standard—make it clear that the fleeting references to "meaningful educational benefit" in *Jefferson County* is nothing more than that. Regardless, this panel, like the *Jefferson County* panel, has no authority to

deviate from *Thompson*, or the cases preceding it,[9] that establish how much benefit must be shown to the child to find that a district provided a student with a FAPE in this circuit.

Thus, the ALJ and the district court applied the correct standard, and we too consider the parents' challenge to the sufficiency of the IEP under this circuit's "some educational benefit" standard. In applying this standard, the measure is whether the IEP is reasonably calculated to guarantee some educational benefit, not whether it *will* do so. Thus, "our precedent instructs that the measure and adequacy of an IEP can only be determined as of the time it is offered to the student. . . . Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." *Thompson*, 540 F.3d at 1149 (quoting *O'Toole*, 144 F.3d at 701–02) (internal quotation marks omitted).

The ALJ and the district court relied on evidence of Drew's progress on past IEPs as proof of the adequacy of the fifth-grade IEP. Although evidence of past progress is not "dispositive of the controlling question whether, going forward, the [latest] IEP was reasonably calculated to confer some educational benefit," we have said that past progress "strongly suggest[s]" the current IEP is "reasonably calculated to continue that trend. *Id.* at 1153.

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[9] *See, e.g.*, *Systema*, 538 F.3d at 1313 ("[W]e apply the 'some benefit' standard the Supreme Court adopted in *Rowley*."); *O'Toole*, 144 F.3d at 699.

In this case, the parents contend there is no trend of progress, both because the District failed to measure Drew's progress on his past IEPs and because any progress made was de minimis. The ALJ found that, despite the reporting deficiencies, it was evident that Drew made progress towards his academic and functional goals on his IEPs and that he received educational benefit during the time he was enrolled in the District.[10] The ALJ's finding of progress is a factual finding that is owed a presumption of correctness

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[10] R., Vol. I at 8 ("Through first and second grade, [Drew] was progressing academically."); *id.* at 9 (finding Drew "was making progress towards some of [his] goals and objectives during . . . third grade"); *id.* (finding the objectives and criteria in Drew's 2008 IEP "were modified to account for [Drew's] progress toward those goals"); *id.* at 10 (finding that despite increased behavioral problems, "during the school year 2009 [Drew] was still making some progress towards [his] academic and functional goals"); *id.* at 12 (concluding that Drew "made progress" during his time in District schools).

The parents point to the district court's statement that the record "did not reveal immense educational growth," but was "sufficient to show a pattern of, at the least, minimal progress." *Id.* at 93. The parents say that statement proves that Drew's progress fell short of even the "some educational benefit" standard which requires *more* than de minimis progress. But the district court also stated that the "past IEPs reveal[] a pattern of *some progress* on his education and functional goals, and that the proposed IEP for the fifth grade continues that pattern." *Id.* at 94 (emphasis added); *see also id.* (stating Drew "made progress towards his academic and functional goals" and "received educational benefit while enrolled in the District"). Moreover, in reviewing the ALJ's decision, we apply the same standard as the district court, and as we conclude below, the ALJ's findings of progress are supported by the record and are sufficient to find Drew received some educational benefit.

under our modified de novo standard of review. *See id.* at 1153 n.9.

And a review of the record reveals support for the ALJ's finding. Drew's IEPs from second, third, and fourth grades[11] reveal that the objectives and measuring criteria listed under the annual goals set for Drew by the IEP team typically increased with difficulty from year to year. In the areas where Drew was not ready to move ahead, the objective remained the same on the next year's IEP. Drew's special education teacher testified at the hearing that the change in objectives reflected the progress Drew was making. Drew's mother also testified that despite her belief Drew was not reaching his potential, she did see some academic progress in first, third, and fourth grades.

This is without question a close case, but we find there are sufficient indications of Drew's past progress to find the IEP rejected by the parents substantively adequate under our prevailing standard. It is clear from the testimony at the due process hearing that Drew is thriving at Firefly. But it is not the District's burden to pay for his placement there when Drew was making some progress under its tutelage. That is all that is required. "The Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make *some*

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[11] Drew's IEPs from years prior to second grade are not in the record.

progress towards the goals within that program." *Thompson*, 540 F.3d at 1155 (emphasis added); *see also Rowley*, 458 U.S. at 197 n.21 (stating that the Act does not guarantee students "a potential-maximizing education").

The parents' final contention is that the District's handling of Drew's behavior is a relevant consideration in determining whether the IEP they rejected was substantively adequate. We find support for their contention in some of the case law, but disagree both that the ALJ ignored Drew's behavioral issues and that the District failed to address those issues. *See Alex R.*, 375 F.3d at 613 ("To meet the . . . substantive criterion of *Rowley*, an IEP must respond to all significant facets of the student's disability, both academic and behavioral."); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1029–30 (8th Cir. 2003) (holding the school district failed to provide an educational benefit by not addressing a student's behavioral issues). As recounted above, the District worked to address the behaviors that affected Drew's ability to learn in the classroom.[12] The ALJ found that "the District worked collaboratively with the parents and other service providers to address [Drew's] behaviors as they arose." R., Vol. I at 13. And when the District reached the conclusion that Drew's behavioral

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[12] Although the parents take issue with the substance of the BIPs put in place by the District in prior years, neither the IDEA nor its implementing regulations prescribe substantive requirements for what should be included in BIPs. "[T]he District's behavioral intervention plan could not have fallen short of substantive criteria that do not exist . . . ." *Alex R.*, 375 F.3d at 615.

problems had escalated to such a degree that they were creating a barrier to his academic progress during his fourth-grade year, they called in specialists to reassess and implement a new behavior plan. Drew never received the benefit of the District's efforts because his parents had already enrolled him in Firefly when the meeting was scheduled to take place.[13]

In sum, the record shows the District was actively working to address Drew's disability-related behaviors and that he made some academic progress despite his behavioral challenges. Accordingly, the parents have not met their burden of showing that the IEP they rejected was not reasonably calculated to enable Drew to receive educational benefits.

III. Conclusion

For the foregoing reasons, we find the District provided Drew a free appropriate public education. Because the IDEA provides that reimbursement is due only where the school district has not made a FAPE available to the child, we find the parents are not

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[13] The fifth-grade IEP rejected by the parents, dated April 14, 2010, did not yet include a new BIP because it was set to be drafted after the meeting with the behavioral specialists scheduled for May 10. The parents gave notice of their intent to withdraw Drew on May 1 and did not attend the May 10 meeting. District officials met without the parents in an effort to memorialize their findings on, and recommendations for, Drew's behavior. *See* R., Vol. I at 11 (finding by the ALJ that on May 10 "a draft BIP was prepared by the District"). The parents did meet with district officials the following November and were again presented with an IEP for Drew, which included the BIP drafted in May. That IEP was also rejected by the parents.

entitled to the compensation they seek. Accordingly, we AFFIRM the judgment of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, JUDGE

Civil Action No. 12-cv-2620-LTB [filed Sept. 15, 2014]

Endrew F., a minor, by and through his parents and next friends, JOSEPH & JENNIFER F.,

Petitioners,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE 1,

Respondent.

ORDER

This matter comes before me upon a request for appellate review of an Office of Administrative Courts decision denying Petitioner's claim under the Individuals with Disabilities Education Act (the "IDEA"), 20 U.S.C. §§ 1400 and 34 C.F.R. §§ 300.500, *et. seq.* Petitioner, Endrew F., through his parents, Joseph and Jennifer F., sought reimbursement for private school tuition and transportation costs from Respondent, Douglas County School District RE 1 (the "District") pursuant to 20 U.S.C. § 1412(a)(10)(C)(ii) and 34 C.F.R. § 300.148(c). The Administrative Courts Agency Decision, issued by an Administrative Law Judge ("ALJ") following a due process hearing, concluded that Petitioner and his parents were not entitled to reimbursement on the basis that the District provided him a free appropriate public education ("FAPE") as is required by the IDEA. This

appeal is fully briefed and ripe for disposition. After consideration of the entire appellate record and the parties' briefing, I AFFIRM.

I. BACKGROUND

Petitioner was born on September 28, 1999. At two years of age he was diagnosed with autism, which is defined as "a developmental disability significantly affecting verbal and nonverbal communication and social interaction . . . that adversely affects a child's educational performance." 34 C.F.R. § 300.8(c)(1)(i). "Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistence [sic] to environmental change or change in daily routines, and unusual responses to sensory experiences." *Id.* In 2003, Petitioner was also diagnosed with Attention Deficit/Hyperactivity Disorder.

Petitioner struggles with the ability to communicate personal needs, emotions and initiations, and does not engage or interact with others in social routines or play. He has compulsive and perseverative behaviors that he has difficulty overcoming throughout the day which, in turn, interferes with the learning environment. He also has many maladaptive behaviors that interfere with his ability to participate, including: eloping, dropping to the ground, climbing, loud vocalizations, perseverative language, and picking/scraping. In addition, Petitioner presents with many severe fears – such as dogs, flies, and using a new or public bathroom – which severely limits his ability to function in school or in the community. It is undisputed that his diagnosis affects his ability to

access education, and he is eligible for services under the IDEA.

Petitioner attended school through second grade at Heritage Elementary, and then moved to Summit View Elementary for third and most of fourth grade, both District schools. In May of 2010, during his fourth grade year, Petitioner's parents decided to withdraw him from Summit View and enroll Petitioner at the Firefly Autism House ("Firefly," previously known as the AltaVista School), a private school that specializes in the education of children with autism. It is undisputed that Petitioner has been able to access education at Firefly where he is making academic, social and behavioral progress. [Administrative Record "AR" Ex. 21] It is Petitioner's parents' position that he stopped making meaningful educational/functional progress in the District schools during his second grade year, and continuing until he withdrew from the District prior to his fifth grade year, as evidenced by the lack of advancement in the goals and objectives set out in his individualized education program ("IEP").

Petitioner's educational records start with his second grade IEP (May 10, 2007 to May 10, 2008) which sets forth six broad annual goals – Communication and Basic Language Skills, Language Arts/Reading and Writing, Mathematics, Physical (Motor), and Self-Advocacy/Self Determination – each implemented by detailed corresponding objectives. [AR Ex. 1] Petitioner's third grade IEP (April 30, 2008 to April 30, 2009) contained the same six annual goals, but with modified objectives. [AR Ex. 2] The same is true for Petitioner's IEP for the four grade (April 14, 2009 to April 14, 2010) except that an annual goal was

added in the area of self-advocacy/ self-determination related to increasing his independence. [AR Ex. 3]

In April 2010, the District developed an IEP for Petitioner's fifth grade year. [AR Ex. 4] This draft IEP was never implemented, however, as Petitioner withdrew from the District before his fifth grade year, in May of 2010, and began attending school at Firefly. Thereafter, input from Firefly was incorporated into a finalized IEP proposed by the District, which was presented during a meeting on November 16, 2010, but was rejected by Petitioner's parents. [AR Ex. 5]

Petitioner's parents argue that he stopped making educational progress during his second grade year in that no meaningful progress is recorded on his IEP for that year. They contend that Petitioner's third grade IEP reveals that 21 of the 26 objectives identified in his second grade IEP were discontinued or abandoned because he was not able to make adequate progress on them. They further assert that Petitioner's fourth grade IEP shows that most of the objectives identified in his third grade IEP were likewise discontinued/abandoned because he was not able to make adequate progress.

Petitioner's parents also argue that the District failed to adequately address his progressively disruptive behavioral issues that, in turn, resulted in his increased inability to access the educational environment. It is undisputed that in his second grade year Petitioner experienced escalating problem behaviors at school, including increased tantrums, yelling, and crying, dropping to the floor and eloping from class. In third grade, following his transfer from

Heritage to Summit View Elementary, Petitioner's social skills declined and his disruptive behaviors increased. During Petitioner's fourth grade year, his ability to function at school and access the educational environment became noticeably worse. He bolted from the classroom frequently and ran out of the school building and into the street on one occasion. He urinated and defecated on the floor of the "calming room" twice. Petitioner's problem behaviors included climbing furniture, falling off furniture, hitting computers or TV screens, yelling, kicking others, kicking walls, head banging, and asking others to punish him.

Petitioner's second grade IEP includes a Behavior Intervention Plan ("BIP") which, his parents argue, addresses only one behavior (Petitioner's fixation on a timer) and there is no indication in the record that it was ever finalized or implemented, as it was stamped "draft" at the top. [AR Ex. 1] His third grade IEP includes no BIP, although it noted that one is required, and his fourth grade IEP includes a BIP, also stamped "draft," that was not developed as a result of any functional behavioral assessment and only addresses two disruptive behaviors. [AR Ex. 3] Petitioner's parents contend that instead of implementing a BIP in response to his behavior problems, the District began limiting his time in the general education classroom and increasing the time he spent in the special education classroom. The proposed IEP for Petitioner's fifth grade year also did not include a BIP, although a meeting was scheduled with District specialists to address Petitioner's behavior issues. Petitioner's parents assert that the District failed to adequately

address his disruptive behaviors which, in turn, prevented his access to education and impeded progress on his educational and functional goals and objectives.

As such, it is Petitioner's parents' position on appeal that the final IEP presented by the District in November of 2010 was not reasonably calculated to provide him with a FAPE, as it was not substantively different than his prior IEPs that failed to evidence progress on his educational/functional goals and, in turn, had failed to provide an appropriate education in the past. Moreover, despite his maladaptive and disruptive behaviors that prevented his ability to access education, the District failed to conduct a functional behavioral assessment, implement appropriate positive behavioral interventions, supports or strategies, or develop an appropriate BIP. Therefore, Petitioner's parents rejected the educational placement and IEP proposed by the District, and they unilaterally enrolled him at Firefly prior to the start of his fifth grade year.

II. PROCEDURAL HISTORY

Petitioner's parents claim the District failed to provide him a FAPE, as required by the IDEA, and so, they seek reimbursement for Petitioner's private school tuition expenses and the reasonable transportation costs incurred for his education at Firefly. After the District refused, they filed a due process complaint with the Colorado Department of Education. A due process hearing was held before an ALJ with the Colorado Office of Administrative Courts on June 6-8, 2012. The ALJ issued an Agency Decision

on July 9, 2012, in which she ruled in favor of the District by concluding that the District provided Petitioner with a FAPE and, as such, did not violate the IDEA.

Specifically, the ALJ found the evidence established that Petitioner made "some measurable progress" towards the academic and functional goals in his IEPs during the time that he was enrolled in the District, as well as on the IEP drafted for his fifth grade year. In so doing, the ALJ noted that the District's progress reporting was often minimal – in that many of the entries were lacking in detail or contained only conclusory statements about whether Petitioner was on target to meet the IEP goals and objectives – but concluded that "[w]hile the District's progress reporting could have been more robust and informative, the absence of more detailed reports does not amount to a substantive denial of a FAPE." Finally, the ALJ rejected Petitioner's parents argument that the District failed to comply with the IDEA by not performing the appropriate behavior assessments or implementing a BIP. As a result, the ALJ concluded that Petitioner and his parents did not meet their burden of establishing a claim for the costs of the Petitioner's unilateral private school placement under the IDEA.

Petitioner and his parents then initiated this action, pursuant to 20 U.S.C. § 1415(i)(2)(A), seeking review and reversal of the ALJ's Agency Decision, and requesting an order awarding them the costs associated with his education placement at Firefly incurred from May 10, 2010, through the present. They also seek an order requiring the District to

maintain Petitioner's placement at Firefly, at the District's expense, until such time as the District provides an IEP that is reasonably calculated to provide him with an FAPE as required by the IDEA.

III. IDEA

The IDEA is a federal statute that provides students with disabilities the right to a FAPE designed to meet their needs. 20 U.S.C. § 1400(d)(1)(A). Central to the IDEA is the requirement that local school districts develop, implement, and annually revise an IEP that is calculated to meet the eligible student's specific educational needs. *Thompson R2-J Sch. Dist. v. Luke P., ex rel. Jeff P.*, 540 F.3d 1143, 1148-49 (10th Cir. 2008); 20 U.S.C. § 1414(d). Thus, the determination of whether a FAPE has been provided turns in large part on the sufficiency of the IEP for each disabled child. *Tyler V., ex rel. Desiree V. v. St. Vrain Valley Sch. Dist. No. RE-1J*, 2011 WL 1045434 (D. Colo. 2011) (unpublished) (*citing A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 675 (4th Cir. 2007)).

Appropriate IEPs "must contain statements concerning a disabled child's level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child's progress." *J.P. ex rel. Peterson v. County Sch. Bd. of Hanover County, Va.*, 516 F.3d 254, 257 (4th Cir. 2008); 20 U.S.C. § 1414(d). Challenges to the adequacy of an IEP can take two forms, i.e., arguments that the IEP was procedurally deficient or that it was substantively deficient. *Tyler V. v. St. Vrain Valley Sch. Dist., supra* (*citing Urban*

ex. rel. Urban v. Jefferson County Sch. Dist. R-1, 89 F.3d 720, 726 (10th Cir. 1996)); *see also* 34 C.F.R. § 300.513.

As relevant here, the IDEA provides for the reimbursement from a public school district when parents decide to enroll their disabled child in a private school without the consent of the school district. Parents are entitled to such reimbursement if: (1) the school district violated the IDEA; and (2) the education provided by the private school is reasonably calculated to enable the child to receive educational benefits. *Thompson R2-J Sch. Dist. v. Luke P., supra,* 540 F.3d at 1148; *see also* 20 U.S.C. § 1412(a)(10)(C)(ii) ("[i]f the parents of a child with a disability . . . enrolls the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if [it] finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment"); 34 C.F.R. § 300.148(c).

In this case, it is undisputed that the education provided by Firefly is reasonably calculated to enable the Petitioner to receive educational benefits. Thus, the sole issue is whether Petitioner and his parents have met their burden to prove that the District violated the IDEA by failing to provide Petitioner with a FAPE. To determine whether a FAPE was provided, the Court must ask whether the IEP was "reasonably calculated to enable [him] to receive educational benefits." *Thompson R2-J Sch. Dist. v. Luke P., supra,* 540 F.3d at 1148-49 (*quoting Bd. of Educ. v. Rowley,*

458 U.S. 176, 207 (1982)). "If the IEP was so calculated, the school district can be said to have provided a FAPE; if not, then not." *Id.* at 1149.

As the Tenth Circuit has noted, this standard is not onerous as "Congress did not impose upon the States any greater substantive educational standard than would be necessary to make . . . access meaningful . . . [t]he intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Thompson R2-J Sch. Dist. v. Luke P., supra*, 540 F.3d at 1149 (*quoting Bd. of Educ. v. Rowley, supra*, 458 U.S. at 192, 198) (rejecting the proposition that Congress sought to guarantee educational services sufficient to "maximize each child's potential"). Rather, Congress sought only to require a "basic floor of opportunity" aimed at providing individualized services sufficient to provide every eligible child with "some educational benefit." *Thompson R2-J Sch. Dist. v. Luke P., supra* (*quoting Bd. of Educ. v. Rowley, supra*, 458 U.S. at 200); *see also Urban v. Jefferson County Sch. Dist. R-1, supra*, 89 F.3d at 727 (requiring that the educational benefit mandated by IDEA must merely be "more than *de minimis*"). Finally, because the question is only whether the IEP is reasonably calculated – not guaranteed – to provide some educational benefit, the measure and adequacy of an IEP can only be determined as of the time it is offered. *See Thompson R2-J Sch. Dist. v. Luke P., supra* (*quoting O'Toole ex rel. O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 701–02 (10th Cir. 1998)).

IV. BURDEN & STANDARD OF REVIEW

The parties challenging the IEP bear the burden of persuasion to show it was deficient. *Tyler V. v. St. Vrain Valley Sch. Dist., supra* (*citing Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005)); *see also Jefferson County Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B.*, 798 F.Supp. 2d 1177, 1183 (D. Colo. 2011).

In determining whether they have met their burden, the Court "shall receive the records of the administrative proceedings;" "shall hear additional evidence" if requested by a party; and, "basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2). "[T]hough the statute specifies that review is *de novo*, the Supreme Court has interpreted the requirement that the district court receive the administrative record to mean that 'due weight' must be given to the administrative proceedings, the fact findings of which are considered *prima facie* correct." *Thompson R2-J Sch. Dist. v. Luke P., supra,* 540 F.3d at 1150 (citation omitted). The Tenth Circuit describes this "somewhat unique standard of review" as a "modified *de novo* standard." *Id.* at 1149; *see also Tyler V. v. St. Vrain Valley Sch. Dist., supra.*

Thus, the District Court reviewing the final state administrative IDEA decision reviews questions of law *de novo. See O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, supra*, 144 F.3d at 698. Otherwise, when the administrative record is fixed, the District Court conducts a "modified *de novo*" review in that it "evaluate[s] the record, and determine[s] whether a

preponderance of the evidence indicates that the ALJ decision should be reversed." *Jefferson County Sch. Dist. R-1 v. Elizabeth E., supra,* 798 F.Supp. 2d at 1184.

In their reply brief, Petitioner's parents argue that I should afford the ALJ's Agency Decision, including her findings of fact, no weight at all because her decision was "entirely conclusory," it fails to substantiate her findings with reference to the evidence or citation to the administrative record, and it neglects to specifically evaluate conflicting evidence or make credibility determinations. However, they have provided me with no case law or authority supporting this argument. Furthermore, while I agree that the written decision lacks specific notation to the record, it contains all the relevant law and findings of fact necessary to support the ALJ's determinations. In fact, the decision is lengthy and quite thorough. While the ALJ does not specifically address credibility issues or the inconsistencies in the evidence, it is clear that she made such determinations in her findings.

Therefore, I reject Petitioner's parents' assertion that I should give no weight to the ALJ's decision. As discussed above, I review questions of law *de novo*, but I undertake a "modified *de novo*" review of the factual determinations in that I "independently review the evidence contained in the administrative record, accept and review additional evidence if necessary, and make a decision based on a preponderance of the evidence, while giving 'due weight' to the administrative proceedings below." *Murray v. Montrose County Sch. Dist. RE-1J,* 51 F.3d 921, 927 (10th Cir. 1995). In so doing, I note that I have

thoroughly read the entire adminstrative [sic] record, including the transcript from the adminstrative [sic] due process hearing, and I have based my decision on that record with due weight to the ALJ's determinations of the contested facts.

V. DISCUSSION

In their complaint, Petitioner's parents assert that the District's final proposed IEP (for his fifth grade year) was both procedurally and substantively insufficient to provide Petitioner with a FAPE in violation of 20 U.S.C. § 1414 (which provides processes for evaluating and implementing IEPs) and 20 U.S.C. § 1412 (which sets forth the District's obligation of providing a FAPE to children with disabilities). Petitioner's parents refer to: 1) the lack of past progress on the goals and objective in Petitioner's IEPs from 2007 through 2010 and, in turn, the inadequacy of the IEP proposed for his fifth grade year; 2) the District's failure to provide regular and meaningful reports to Petitioner's parents as to his progress; and 3) the District's failure to perform a functional behavioral assessment and develop an appropriate BIP for him. His parents contend that the lack of progress on Petitioner's IEPs, coupled with the failure of the District to provide reporting and behavior assessment/intervention, and a proposed IEP that was a continuation of that pattern, resulted in denial of a FAPE.

A. Lack of Progress on IEPs

Petitioner's parents first argue that his IEPs with the District reveal "an almost complete lack of progress" starting with the IEP for second grade and

continuing through the IEP proposed for his fifth grade year. They contend that over that three year period (his second, third and fourth grade years) Petitioner's educational records, as well the record on appeal as a whole, are "devoid of any demonstrable evidence that [he] made any measurable progress on the goals and objective contained in his IEPs." The District, in response, argues that while not always consistent or as robust as the IEP team would have hoped, Petitioner did in fact make educational/functional progress while enrolled in the District and under the IEPs developed for him.

The IDEA mandates that school districts provide IEPs for all eligible disabled students, "but then left the content of those programs entirely to local educators and parents, requiring only that they include 'a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum' and meet the child's 'other educational needs.'" *Thompson R2-J Sch. Dist. v. Luke P., supra*, 540 F.3d at 1151 (*quoting* 20 U.S.C. § 1414(d)(1)(A)(i)(II)). As such, Congress established procedures to guarantee disabled students access and opportunity, not substantive outcomes. *Id.* (*citing Bd. of Educ. v. Rowley, supra*, 458 U.S. at 192, 197 n.21) (noting that Congress did not guarantee children "a potential - maximizing education," but rather some educational benefit). Although the controlling question is whether, going forward, the IEP proposed by the District was reasonably calculated to confer some educational

benefit, past progress on the IEP goals "strongly suggests" that when a proposed IEP is modeled on prior IEPs that had succeeded in generating some progress, the proposed IEP "was reasonably calculated to continue that trend." *Thompson R2-J Sch. Dist. v. Luke P., supra*, 540 F.3d at 1153.

Petitioner's second grade IEP, beginning in May of 2007 and ending in May of 2008, contains six broad academic/functional annual goals, with several corresponding objectives. [AR Ex. 1] For example, it provides an annual goal that Petitioner will demonstrate basic language and communication skills, and then lists six short-term objectives employed to meet that goal such as that he will be able to express his desires and emotions when prompted, and he will make eye contact with peers and teachers with minimal prompting. In the discipline of language arts, an annual goal was that Petitioner will improve his writing skills. There are three listed objectives to this goal; for example, the first one is that given a detailed picture, Petitioner will write one complete sentence describing the picture independently. This objective contains a criteria: ("3) performs activity with verbal/gestural cues"), a baseline: ("0) does not participate"), and a method of measurement: ("Demonstration/Performance"). At the bottom of each objective, there is a section to record quarterly progress, with a place to indicate "Level" and the "Status," as well as make a comment. A progress key defines Level 1 as "skill/behavior is rarely or never demonstrated, therefore incomplete positive data is available," up to Level 4 which is that the "skill/behavior is generalized and transferred without

prompts and is above expectation of plan." Petitioner's second grade IEP contains twenty-six objectives, and each objective has a progress report only for the period ending in the beginning of November 2007. Each reporting is at a Level 2 ("skill/behavior is inconsistent with frequent prompts and is below expectation of plan") or Level 3 ("skill/behavior is consistent over time with few prompts and meets expectation of plan"), and the status is either left blank or "[w]ill be continued." [AR Ex.1] It is Petitioner's parents' assertion that no meaningful progress is recorded on his second grade IEP.

In his third grade IEP, for the period of April 2008 through April 2009, there are six annual goals, and twenty-three listed objectives. [AR Ex.2] This IEP provides, in essence, the same annual goals with adjustments in the implementing objectives. For example, for the goal of demonstrating basic language and communication skills, the second-grade objective is to "make eye contact with peers and teachers with minimal prompting," while the third grade objective is to "make and maintain eye contact with peers and adults" without prompting. The IEP for third grade does not show progress reporting for most of the objectives, but does indicate progress reporting for three periods for the objective "will use correct punctuation, capitalization and spacing in his writing" and the objective of "[g]iven a variety of coins and dollars, [Petitioner] will accurately count the money up to $5.00." At each period the status is "[w]ill be continued," and the Level is at 3 or, in the case of his use of punctuation, capitalization and spacing, he went down to a Level 2 as he "lost some independence in

remembering to use correct conventions in his writing." It is Petitioners parents' position that the objectives listed were merely carried over from the past year with little or no increase in difficulty resulting, in turn, in no measurable progress on Petitioner's academic goals. Petitioner's parents maintain that twenty-one of the twenty-six objectives identified in his second grade IEP were discontinued or abandoned in his third grade IEP because he was not able to make adequate progress on them.

In Petitioner's fourth grade IEP, for the period of April 2009 through April 2010, there are seven annual goals, and twenty-three listed objectives. [AR Ex.3] Again, the general goals are the same except for the addition of a self-advocacy goal of "[i]ncrease[d] independence," with implementing objectives such as "independently follow along with morning and afternoon routines of packing and unpacking his backpack" and "[u]sing a work system, [h]e will increase his independent worktime in a nonpreferred assignment." The objectives related to his continuing goals were again changed or modified. For example, the third grade IEP provides that "[g]iven a variety of coins and dollars, [Petitioner] will accurately count the money up to $5.00," and his fourth grade objective requires that he then will "hand over the correct amount." The objective of learning his multiplication facts "from 0-10" in third grade is amended to learning his multiplication facts "from 6-10." The IEP for fourth grade provides progress reporting for all four quarters, except in the areas of increased independence and improved social skills, which have reporting in only three quarters. Several of the objectives were deemed

at the end of the year to be "completed," while others were "modified," "will be continued" or "no longer appropriate." The objectives all went up from a Level 2 to a Level 3 (or remained at a Level 3 throughout the year) except in learning his division facts from 0-5 (where it was noted that the focus was changed to mastering multiplication), and in increasing his independent work time on a non-preferred assignment. His objective to respond with a relevant comment to others did not increase above a Level 2. His parents again claim that Petitioner's four grade IEP reveals that most of the objectives identified in his third grade IEP were likewise discontinued or abandoned because he was not able to make adequate progress.

In the initial IEP drafted for Petitioner's fifth grade year, for the period of April 2010 through April 2011, his overall annual goals were altered in the areas of self-advocacy and social interaction. [AR Ex. 4] The objectives not completed from his fourth grade IEP were continued (particularly in the area of math), and additional objectives were added to address his communication and basic language goal of "improv[ing] social communication skills in order to access the general education curriculum " as well as his new goals to "learn and utilize age appropriate coping strategies when feeling anxious and seek adult support when needed" and "participate in a developmentally appropriate job in an educational setting." Firefly used the goals and objectives in this draft IEP to assess Petitioner's status upon his enrollment in May of 2010, in order to determine his level of proficiency or progress on the objectives, based on the measurement criteria provided. [Transcript

Volume "TR" 2, pp. 238, 242-249, 293-94] By July 23, 2010, Firefly determined that Petitioner had mastered some of the draft IEP objectives, including all four language arts objectives, and was "keeping goal" as to most of the objectives that were not mastered, except in the communication and basic language skills objectives, which were amended. [AR Ex. 12]

The finalized IEP proposed by the District, dated November 16, 2010, provides essentially the same goals and objectives, except that his objectives for his social goals are increased and more clearly defined. [AR Ex. 5] For example, his objectives of utilizing age appropriate coping strategies and to participate in a developmentally appropriate job are redefined to focus on "learn[ing] and utilizing strategies to improve social interactions with adults and peers" and to "increase independence in an educational setting in order to demonstrate decreased anxiety." The majority of the implementing objectives contained more detail about how they would be carried out and measured, as well as information related to Firefly's observations and data as to Petitioner's current abilities to perform. For example, an objective to improve his social communication skills was changed from demonstrating two appropriate verbalizations during game play (simple board game, bingo, etc.) with at least one peer, to: "[g]iven a structured small group setting, [Petitioner] will demonstrate 2 appropriate verbalizations, following a model/prompt, during game play (simple board game, bingo, racing matchbox cars, etc.) with at least one peer." The checkpoint criteria remained the same (of more than or equal to 2 occurrences with less than or equal to 1 verbal

prompt), but additional information was added for measurement purposes ("[w]hen [Petitioner] engages in structured play with a peer, he will make at least two appropriate comments or questions directed at the peer and that are related to the situation"). In addition, his current status or ability to perform the objective, as observed at Firefly, was indicated (Petitioner "does verbalize during game play; however, his comments are often unrelated to the activity and are not directed at other people"). Parents contend that this finalized IEP constitutes a continuation of the prior pattern revealing no progress by Petitioner on his IEP goals and objectives. The finalized IEP was not accepted, and Petitioner remained enrolled at Firefly where a new IEP was implemented using, at least in part, the goals and objectives contained in the District's final proposed IEP from the District. [TR 2, pp. 298-306]

At the due process hearing, parents presented testimony from Anna Kroncke who completed a neuropsychological evaluation of Petitioner for his parents after he enrolled in Firefly in August of 2011. [AR Ex. 20] [TR 1, p. 125] Ms. Kroncke testified that she reviewed Petitioner's academic records from the District (including the goals and objectives in his IEPs), but she "wasn't able to determine measurable progress." [TR 1, pp. 138, 130, 154, 158-59, 162] She explained that the goals and objectives in Petitioner's IEPs were vague or hard to measure, and the the progress reports lacked quantifiable data. [TR 1, pp. 140, 144-49, 150-51] She concluded that it was her opinion that there was no evidence of academic progress. [TR 1, p. 165] On cross-examination, she

admitted that minimal progress data was noted (such as the level of progress or that an objective was completed), and that additional information was provided in narrative form, but that it was insufficient – in her opinion – to determine any academic progress. [TR 1, pp. 186-87, 193-94, 196-200]

Petitioner's special education teacher at Summit View, Amy Holton, testified that Petitioner's IEP goals from one year to the next were similar, but that the implementing objectives were changed to accommodate his progress and usually included an additional task or skill. For example, she testified that from his second grade IEP to his third grade IEP, Petitioner's writing objective was increased to add capitalization when working on correct punctuation and spacing. [TR 2, pp. 341-44] With regard to the proposed IEP for Petitioner's fifth grade year, she testified that the objectives were again modified to add skills, such as the ability to comprehend and follow directions from nonfiction (in addition to fiction) writing, in order to make progress on his broad annual goals. [TR 2, pp. 373-382] When reporting on Petitioner's progress, Ms. Holton testified that she used raw data from the classroom – such as her anecdotal notes, and data with percentages – in her "running log." Then, at the reporting periods, she would accumulate it and rate out his progress (via the level system) and indicate his status towards completion of the objective (usually as "continued" or, at the end of the year, "completed" if applicable). [TR 2, pp. 430-432] As the school year progressed, she usually rated his progress on an objective at Level 3, which meant that he has not completed or mastered

the objective, but that he was on the right course or trajectory to be able to complete the objective and in meeting the expectation plan. [TR 2, pp. 433-37] She testified that this reporting was adequate, consistent with District practice, and was discussed with parents at the annual IEP meeting. [TR 2, pp. 437-8, 440] Ms. Holton testified that it was her opinion that the objectives related to each goal were increased in each subsequent IEP. [TR 2, pp. 352-53, 360-61, 371-72]

The Director of Special Education for the District, Don Bell, testified that the District declined parents' request for reimbursement at Firefly because the District felt that it could provide Petitioner with a FAPE in the least restrictive environment at Summit View because his past IEPs had shown growth in his goals and objectives. [TR 3, pp. 482-3] He testified that the progress reporting in Petitioner's IEP met the required standard, although he admitted that he would have hoped to have seen additional entries. [TR 3, pp. 490-91] When specifically asked about the reporting in Petitioner's fourth grade IEP, he admitted that the progress on a language arts objective, as an example, contained "not as much [reporting] as I would like to see." [TR 3, p. 493] However, he further indicated that other places within the IEPs spoke to Petitioner's progress, and it was his opinion that the documents, when taken as a whole, provided sufficient information to assess his educational growth. [TR 3, pp. 493-94] On cross-examination, Mr. Bell indicated that the goals and objectives in the proposed fifth grade IEP from the District – in the draft IEP in May of 2010 and the final proposed IEP presented in November 2010 – were very similar and contained only

"some slight" changes in either criteria or the actual wording of the goal. [TR 3, pp. 488-89] He further testified that both Firefly and the parents, who had an opportunity to provide input, did not object to the fact that they were similar goals and objectives. [TR 3, p. 505]

Petitioner's mother testified that although Petitioner never achieved his academic potential, they did see some reading level improvements in third grade and some academic progress in fourth grade. [TR 1, pp. 71, 74, 96-97] With regard to the proposed fifth grade IEPs, however, she saw only a continuation of the past IEP pattern of no measurable increase in the goals and objectives required. [TR 1, p. 93]

My review of the record establishes that while the additions and modification in his IEP objectives from year to year – including the IEP proposed for his fifth grade year – did not reveal immense educational growth, they were sufficient to show a pattern of, at the least, minimal progress. For example, his math objectives related to money were modified as follows. In his second grade IEP the math objectives were: 1) given subtraction problems using numbers 1-12, he will use manipulatives to accurately solve the problem; 2) given addition problems, he will demonstrate adding whole numbers with regrouping with sums to 20; 3) he will identify and state the value of coins; and 4) given coins, he will accurately count to one dollar. [AR Ex. 1] In his third grade IEP the math objectives were: 1) given a variety of coins and dollars, he will accurately count the money up to $5.00; 2) he will understand time related vocabulary and concepts as it relates to the calendar; 3) when given a clock, he will

indicate the time shown on the face in quarter hours, five minutes and minute intervals; and 4) given a word problem, he will be able to identify which operation (addition, subtraction or multiplication) to use to solve the problem. [AR Ex. 2] In his fourth grade IEP the math objectives were: 1) given a variety of coins and dollars, he will accurately count money up to $5.00 and then hand over the correct amount counted; 2) when identifying an object he wishes to purchase, he will be able to answer the question "is that enough?"; 3) he will understand time related vocabulary and concepts as it relates to the calendar; 4) given an analog clock, he will be able to tell the correct time; 5) given a word problem, he will be able to identify which operation (addition, subtraction, multiplication or division) to use to solve the problem; 6) he will learn his multiplication facts 6-10; and 7) he will learn his division facts 0-5. [AR Ex. 3] And, in his final proposed fifth grade IEP the math objectives were: 1) given a variety of coins and dollars, he will accurately count money up to $5.00 and then hand over the correct amount counted; 2) when identifying an object he wishes to purchase, he will be able to answer the question "is that enough money?"; 3) given a word problem, he will be able to identify which operation (addition, subtraction, multiplication or division) to use to solve the problem; 4) he will learn his multiplication facts 6-12; and 5) he will learn his division facts 0-5. [AR Ex. 5]

While some of the objectives carried over from year to year, and some are only slightly modified, it is clear that the expectation in the objectives are increased over time. Petitioner's past IEPs revealed a pattern of

some progress on his education and functional goals, and that the proposed IEP for the fifth grade continues that pattern. *Thompson R2-J Sch. Dist. v. Luke P., supra*, 540 F.3d at 1153 (past progress on the IEP goals "strongly suggests" that when a proposed IEP is modeled on prior IEPs that had succeeded in generating some progress, the proposed IEP "was reasonably calculated to continue that trend"). I disagree with Petitioner's parents' argument that the modifications were insufficient to show any meaningful progress. Rather, I agree with the ALJ that Petitioner made progress towards his academic and functional goals in his IEPs and although this does not mean that he achieved every objective, or that he made progress on every goal, the evidence shows that he received educational benefit while enrolled in the District. As such, Petitioner's parents have failed to show that the District's IEPs – both past and proposed for the future – were not reasonably calculated to provide him with some educational benefit. *Thompson R2-J Sch. Dist. v. Luke P., supra*, 540 F.3d. at 1150 (whether a proposed IEP was reasonably calculated to enable a child to receive education benefits requires only a "basic floor of opportunity aimed at providing individualized services sufficient to provide every eligible child with some educational benefit").

B. Failure to Provide Progress Reports

Petitioner's parents also contend that they were not provided adequate progress reports as required by the IDEA. They argue that a failure to provide periodic progress reports can amount to a substantive violations of the IDEA which, in turn, denies parents

an opportunity to meaningfully participate in meeting to develop their child's IEP. In support of this argument, Petitioner's parents cite to *Escambia County Bd. of Educ. v. Benton*, 406 F.Supp. 2d 1248, 1273-74 (S.D. Ala. 2005), in which a District Court in the Southern District of Alabama deferred to the Hearing Officer's finding of adverse impact when the "dates of mastery are either excluded from IEPs or jotted in as a *pro forma* afterthought at year's end [as] the IEP team cannot determine the progress that the child has been making during the school year' towards achieving annual goals and whether adjustments to the program might be necessary." *Id.* The District, in response, concedes that the progress reporting on the IEPs in this case – especially on Petitioner's second grade IEP – was lacking in details, but argues that the reporting was sufficient to assess his progress. The District notes that there was constant informal communication between the school and the parents on Petitioner's progress, and there is ample evidence that Petitioner's parents participated in his education. The District contends that Petitioner's parent were aware of his progress, as evidenced by their role in modifying his IEP goals and objectives.

At the due process hearing, Petitioner's mother testified that she could not recall ever seeing or being provided with "any kind of quantitative data on either his progress or achievements with regard to his goals" beyond the reporting on his IEPs. [TR 1, pp. 68, 74, 85-88, 121] She also testified that the progress notes on the IEPs did not provide her with information about whether or not he was progressing towards completing the objectives. [TR 1, pp. 117-122] However, on cross-

examination she indicated that she did receive the IEPs for each year which indicated the goals and objectives, the level/measure of success on each goal, his current function with regard to that goal and where he was on the progress. [TR 1, pp. 100-04] She also testified that if she was confused about any reporting or information on the IEP, she had opportunities to ask for clarification both during the IEP meetings and in between, and that she had asked questions and provided input, but did not express any disagreement with the IEPs because she had hoped then [sic] would work. [TR 1, pp. 103, 110]

The record is clear that there was significant informal communication with the parents as to Petitioner's progress. [TR 1, pp. 72, 109] Petitioner's mother testified that she had regular communication with Ms. Holton in which she expressed her concerns about Petitioner's deteriorating behaviors and how that was, at least in part, overshadowing his academics. [TR 1, p. 55] In addition, Ms. Holton implemented a back-and-forth notebook with his parents in order to address behavior issues and report how Petitioner performed at school. [AR Ex. J] [TR 1, p. 55] [TR 2, pp. 384-5] Although Petitioner's mother testified that there was not much communication about his academic progress [TR 1, pp. 85-87], there is evidence that Petitioner's parents provided feedback about their concerns related to the educational/functional objectives in his IEPs. [TR 1, pp. 110-11, TR 2, pp. 358, 390-91] In April of 2009, Petitioner's mother provided significant input about her desired goals for his next school year including a breakdown of the academic and functional goals she

believed should be continued, modified, dropped or added. [AR Ex. G]

Furthermore, Ms. Holton testified that Petitioner's parents received a copy of the IEPs, including the notations of progress reporting, each year at the annual IEP meeting. She further testified that three times a year she reported on his progress on the IEP goals and objectives, which were copied and sent home with his report card in Petitioner's daily take-home folder in his backpack. In addition, she testified that she notified Petitioner's parent that the report card and IEP report would be coming home in case they got lost from Petitioner's backpack. [TR 2, pp. 408-411, 413] Finally, Ms. Holton testified that Petitioner's parents did not complain that the goals/objectives in IEPs where inappropriate [TR 2, p. 346], and they were made aware of his end-of-year progress (close-out reporting) with his IEP objective each year at the formal IEP meeting for next year. [TR 2, pp. 331, 476-77]

As a result, I reject the Petitioner's parents' argument that the record is "devoid of any written data or information about [his] work on or progress towards that goals and objectives contained in the IEPs" and that this "violates the IDEA and makes it impossible for [his parents] to participate in [his] educational programming in any meaningful way." First, as noted by the District, the IDEA requires only periodic reporting on the progress the student is making toward meeting his or her IEP annual goals, and while the IEP must contain description of when those reports will be provided, there are no specific legal requirements about the frequency or content of

the reports. *See* 34 C.F.R. § 300.320(a)(3) (IEPs require a description of how the child's progress will be measured, and when "periodic reports on the progress the child is making . . . will be provided). In addition, there is record evidence that Petitioner's parents received the quarterly IEP reporting which was sufficient for them to participate in the process as evidenced by their continued formal and informal communications about his progress. Although the IEPs in Petitioner's second and third grade years are missing many of the quarterly progress reports, and those included were conclusory as to whether he was on course of meeting the objectives, it is undisputed that progress was reported at the annual IEP meeting and that parents were in constant informal communication about his progress. Therefore, I find that Petitioner's parents have not met their burden to prove that the lack of progress reporting resulted in a denial of his FAPE.

C. Failure to Perform a Behavioral Assessment and/or Intervention Plan

Finally, Petitioner and his parents contend that the IEPs were deficient in that they failed to adequately address his behavioral problems because the District did not conduct a functional behavior assessment, or implement an adequate BIP. They argue that this failure resulted in an escalation of his disruptive behaviors, thereby preventing him from making any meaningful progress on his educational/functional goals and objectives in his IEPs and, as such, he did not receive a FAPE. The District asserts that the IDEA does not require either, except in circumstances not present here, as there is no

evidence in the record that Petitioner's placement was changed, or that he was removed for more than ten days, due to disciplinary actions. *See* 34 C.F.R. § 300.530(d)(1)(ii) (requiring an functional behavior assessment "as appropriate" when a student has been removed from a current placement for more than 10 days due to disciplinary infractions). Rather, the IDEA requires only that the IEP team consider interventions to address behavioral issues. 20 U.S.C. § 1414(d)(3)(B)(i) (in the case of a child whose behavior impedes the child's learning, the IEP team shall "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior"); *see also* 34 C.F.R. § 300.324(a)(2)(i). Moreover, the District asserts that Petitioner's second grade IEP did, in fact, include a BIP (as was found by the ALJ) [AR Ex. 1], as did his fourth grade IEP [AR Ex. 3], and that another behavior assessment and plan was in progress at the time Petitioner withdrew from the District and enrolled at Firefly. Finally, it notes that the record is clear that it regularly addressed behavioral issues, as they arose, with the cooperation of Petitioner's parents.

It is undisputed that Petitioner's behavioral issues interfered with his ability to learn. [TR 1, pp. 109, 138] [TR 2, pp. 254-59, 382-87] Ms. Holton testified that her interventions with Petitioner's escalating disruptive behaviors were not effective, but that she was in the process of addressing them with the District. [TR 2, pp. 387-89] After graphing patterns of Petitioner's behavior during his fourth grade year – such as the specific behavior, the circumstances, and the time of day – Ms. Holton testified that she was unable to

discern causation and, as such, scheduled a meeting with the District Autism Specialist and the Behavior Specialist. [TR 2, pp. 387-389, 391-93, 461, 464] Ms. Houston testified that by the time they drafted Petitioner's IEP for his fifth grade year, they had scheduled a separate behavior meeting to address and change Petitioner's behavior plan. [TR 2, 382-83] Although this meeting with the specialists did not occur, because Petitioner had previously withdrawn from the District, the IEP team met to document their data and to formulate an initial plan regarding Petitioner's behavioral issues. [TR 2, p. 393] [TR 3, pp. 465-68] [Ex. F] On cross-examination, Ms. Holton testified that she was not aware, aside from her anecdotal classroom data, if other behavioral data was collected by the District in order to create either a BIP for Petitioner. [TR 3, 449-452]

I agree with the District that the record reveals that it was addressing Petitioner's behavioral issues, in order to allow him better access to education, and that Petitioner's parents were involved in the management thereof. Whether or not the District failed to conduct a functional behavioral assessment or implement a BIP in this case, at any particular or specific time, is mainly irrelevant to this decision as the Petitioner does not dispute that the IDEA does not require such assessment or plan. Rather, I am to determine whether the District's approach to managing Petitioner's behavior, in order to allow him to effectively learn, failed to provide him with a FAPE. The evidence of record is that the District was, at the very least, addressing Petitioner's behavioral issues and that a new behavior plan was deemed necessary

and was in progress at the time that Petitioner withdrew from the District. As a result, I find that despite the District's inability to manage Petitioner's escalating behavioral issues at the time of his withdrawal, it was in the process of reassessing his BIP in order to address the issue. As such, Petition has not met his burden of proving that his was denied a FAPE.

VI. CONCLUSION

Because Petitioner and his parents have failed to meet their burden to prove that the District violated the IDEA by failing to provide Petitioner a FAPE, they are not entitled to reimbursement of his tuition and transportation costs to attend school at Firefly under 20 U.S.C. § 1412(a)(10)(C)(ii) and 34 C.F.R. § 300.148(c).

ACCORDINGLY, for the foregoing reasons, I AFFIRM the Administrative Court Agency Decision.

Dated: September 15, 2014, in Denver, Colorado.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, JUDGE

APPENDIX C

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17th Street, Suite 1300 Denver, Colorado 80202	^ COURT USE ONLY ^
[Father] and [Mother] on behalf of [Student], a minor, Complainants, vs. DOUGLAS COUNTY SCHOOL DISTRICT RE 1, Respondent.	CASE NUMBER: EA 2012-0006 [filed July 9, 2012]

AGENCY DECISION

On February 21, 2012 the Colorado Department of Education, Exceptional Student Services Unit, received a due process complaint filed by [Parents] ("the parents") on behalf of their minor child, [Student], alleging that the Douglas County School District RE 1 ("District") had denied [Student] a free and appropriate public education under the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(f), its implementing regulations at 34 C.F.R. § 300.511, and Colorado's Exceptional Children's Educational Act ("ECEA"), 1 CCR 301-8. The complaint was forwarded to the Office of Administrative Courts and assigned to Administrative Law Judge ("ALJ") Michelle A. Norcross for an impartial due process hearing. Hearing was held in

Denver, Colorado on June 6 – 8, 2012.[1] The parents were represented by Jack D. Robinson, Esq. The District was represented by Robert Ross, Esq. At hearing, the ALJ admitted into evidence Complainants' exhibits 1 – 25, and District's exhibits F – J. The proceedings were recorded in courtroom 2.

ISSUES PRESENTED

Whether the District failed to provide [Student] with a free appropriate public education ("FAPE") as required by the Individuals with Disabilities Education Act ("IDEA"); and, whether the District is responsible for tuition reimbursement and travel expenses related to [Student]'s unilateral private school placement.

FINDINGS OF FACT:

Based on the evidence in the record, the ALJ finds the following:

1. [Student] is a [age]-year old [gender] who was born on [date]. [Student] was diagnosed with autism at the age of two. In 2003, [Student] was also diagnosed with Attention Deficit/ Hyperactivity Disorder.

2. [Student]'s disabilities impact [Student's] cognitive functioning, language and reading skills, as well as [Student's] social and adaptive development.

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[1] The hearing was originally scheduled for April 23 – 25, 2012. At the request of the parties, on April 18, 2012, the hearing was continued to June 6 - 8, 2012 and the decision deadline was extended beyond the 45-day time limit provided in state and federal regulations to June 22, 2012. Per the request of counsel, the decision deadline was further extended to July 16, 2012 to allow for the filing of post-hearing briefs.

[Student] is unable to engage in age-appropriate socialization and is not always able to express [Student's] needs or wants. [Student] plays well independently but generally does not approach or engage in play with other children. [Student] becomes frustrated and anxious when [Student] is challenged or is around a feared stimulus, which includes dogs, flies, spilled liquids, airports and airplanes, and public restrooms.

3. When [Student] becomes anxious or agitated, [Student] has difficulty calming down on [Student's] own. For the past several years, [Student] has engaged in the following disruptive and self-harming behaviors when agitated or anxious: climbing over classroom furniture, walls, and other students, hitting objects, yelling, screaming, kicking, head banging, running away and has twice taken off all [Student's] clothing and urinated and defecated in the classroom.

4. [Student] started preschool in the Douglas County School District RE-1, where [Student] was qualified to receive special education services and had an individualized education program ("IEP").

5. [Student] was enrolled in the District's preschool program for three years. In 2005, at the age of [age], [Student] advanced to the half-day kindergarten program at [School #1].

6. Preschool went well for [Student]. When [Student] entered preschool [Student] spoke only a few single words but was speaking in phrases and sentences by the time [Student] entered kindergarten. Kindergarten was also successful. [Student's] social interactions were improving and [Student] enjoyed

attending school. [Student] was placed in the general education kindergarten classroom and continued to receive special education and related supports and services, including speech therapy, occupational therapy and social skills supports outside of school.

7. After completing kindergarten, [Student] remained at [School #1], where [Student] attended full-day first and second grades in 2006 and 2007, respectively. During these years, [Student] was also placed in the general education classroom. [Student] continued to receive pull out special education and related supports and services. At this time, [Student] was receiving 20 hours per week of speech therapy, occupational therapy, group and individual therapy and social skills interventions. [Student] was also assigned a full-time paraprofessional to help keep [Student] on task and to help deescalate [Student's] disruptive behaviors.

8. Neither party produced [Student]'s 2005 or 2006 IEP. The first available IEP is [Student's] 2007 IEP. [Student]'s 2007 IEP includes several academic and functional goals, short-term objectives, as well as a behavioral intervention plan ("BIP"). The IEP also contains several narrative sections describing [Student's] present levels of educational and functional performance and the educational services to be provided. In this year, [Student] was to be inside the general education classroom between 40% and 79% of the day. [Student] spent the rest of the day in the special education classroom.

9. Through first and second grade, [Student] was progressing academically. [Student] was meeting several of the goals and objectives in [Student's] IEPs and developing limited social skills. Sometime during [Student's] second grade year, [Student]'s behavioral problems began increasing. [Student] started having more frequent tantrums in class, which included yelling, crying and dropping to the floor, running out of line during class transitions; and, on occasion urinating in [Student's] pants. [Mother] had several conversations with [Student]'s special education teacher at the time trying to find a solution to [Student]'s disruptive behaviors.

10. The parents had had some success redirecting [Student]'s behaviors at home using a timer. The timer worked in the classroom for a short while but ultimately created bigger problems as it became an obsession for [Student]. When [Student] was denied access to the timer in [Student's] classroom, [Student] would leave class in search of another timer and when [Student] found one [Student] would disrupt that classroom, crawling over other students, desks, and chairs to get to the timer.

11. The problem behaviors noted by both [Student's] teacher and [Student's] parents are documented in [Student's] BIP. Recognizing that [Student] responded more favorably to rewards for positive behavior than consequences for negative behavior, the plan outlined ways to redirect and reward [Student]. The BIP incorporates rewards for good behavior (e.g. computer time), picture cards to redirect [Student] back on task, and transporting [Student] to another classroom where [Student] could

engage in self-calming behaviors like swinging or listening to music with the lights turned off. It also included use of District-approved restrain procedures if [Student] was in danger of hurting [him/her]self or others.

12. [Student] remained at [School #1] until [Student's] third grade year when [Student] was transferred to [School #2]. [School #2] is [Student]'s neighborhood school, but at the time [Student] was enrolled in the District, [School #2] did not have a significant support needs ("SSN") classroom. When the SSN classroom was completed at [School #2], [Student] and [Student's] classmates were transferred to [School #2].

13. The transition to [School #2] from [School #1] was difficult for [Student]. [Student's] behavioral problems continued. Throughout the year, [Student's] social skills had declined and [Student] was engaging in all types of avoidance behaviors, such as dropping to the floor, yelling, crying and urinating in [Student's] pants. [Student] did not want to go school.

14. [Special education teacher] was [Student]'s special education teacher at [School #2]. She worked with [Student] at [School #1], but was not [Student's] classroom teacher until third grade. Similar to [Student's] other years in the District, for third grade, [Student] was placed in the general education classroom with support from a paraprofessional. [Student] continued to receive special education and related services in the self-contained SSN classroom.

15. [Special education teacher] and the parents used a back-and-forth notebook to communicate how [Student] was doing at home and in school. The entries confirm the increase in [Student]'s disruptive behaviors. Academically, [Student] was making progress towards some of [Student's] goals and objectives during [Student's] third grade year, but [Student's] behaviors were beginning to interfere with [Student's] educational opportunities.

16. Prior to each IEP meeting and on a quarterly basis throughout the years [Student] was at [School #2], [special education teacher] provided the parents with progress updates regarding [Student]'s performance. The District's IEPs have a section under each objective for documenting [Student]'s progress towards [Student's] annual goals. Some of the objectives contain little or no progress reporting; however, most contain at least conclusory statements about whether [Student] was on track to meet the expectations of the plan and whether the objective had been completed or would be continued.

17. The goals in [Student]'s 2008 IEP are similar, if not identical, to the goals in [Student's] 2007 IEP; however, most of the objectives and criteria in the 2008 IEP were modified to account for [Student]'s progress toward those goals.

18. In the spring of 2009, the IEP team scheduled a meeting in April 2009 to develop [Student]'s 2009 IEP.

19. Prior to the April 2009 IEP meeting, [Mother] provided her desires to the team regarding [Student]'s goals for the next school year, which included:

[Student] spending more time in the general education classroom, increasing [Student]'s reading and writing skills, increasing [Student's] social interactions with peers, and decreasing [Student's] dependence on a paraprofessional.

20. [Mother] also requested that 4 of the 5 reading goals in [Student]'s 2008 IEP be maintained and carried over to [Student's] 4th grade IEP. She also requested that several of the math, writing and social skills goals be maintained but with more specific objectives.

21. [Student]'s 2008 and 2009 IEPs contain several academic and functional goals, short-term objectives, as well as several narrative sections describing [Student's] present levels of educational and functional performance and the educational services to be provided. Again, [Student] was to be inside the general education classroom between 40% and 79% of the day and receiving pull out special education and related services the remainder of the day.

22. [Student]'s 4th grade year at [School #2] started off very rocky. [Student] did not want to attend school and [Student's] tantrums started increasing in both severity and frequency. There were times when [Student] had to be removed from the classroom because [Student] was crawling under desks, slapping the computer screen, or being disrespectful to [Student's] peers by messing with their work or desk. Other noted areas of concern were [Student]s' tendencies to wander out of the room without supervision and run out of line before school when the class was lining up for the bell to ring. And, on at least

two occasions in school year 2009, [Student] became so upset and agitated that [Student] ran from school and when [Student] returned [Student] took off all [Student's] clothing and urinated and defecated on the classroom floor.

23. [Mother] had many conversations that year with [special education teacher] and [Student]'s social worker to find a solution to [Student]'s increasing behavioral problems. Everyone was working together to solve the problem but [Student]s' problem behaviors continued. By spring of 2010, [special education teacher] suggested that the IEP team bring in an autism specialist.

24. Despite the increase in [Student]'s problem behaviors, during school year 2009 [Student] was still making some progress towards [Student's] academic and functional goals.

25. The start of the 2010 school year was much the same as the 2009 school year. The parents continued to express their concern to [Student]'s teachers and the IEP team regarding [Student]'s behaviors, elopements and lack of social progress. There is no persuasive evidence that prior to that point the parents complained to the administration about any concern they had regarding [Student]'s academic progress or lack thereof.

26. With input from the parents, on April 13, 2010 the IEP team drafted a new IEP for [Student]. Similar to [Student's] prior IEPs, the annual goals in [Student]'s 2010 IEP are nearly identical to those in [Student's] 2009 IEP. The difference between the two

programs appears in modifications that were made to the objectives and the measuring criteria.

27. [Student]'s April 2010 IEP contains several academic and functional goals, short-term objectives, as well as several narrative sections describing [Student's] present levels of educational and functional performance and the educational services to be provided. This year, [Student] was to be inside the general education less than 40% of the day and receiving pull out special education and related services the remainder of the day.

28. When the IEP team met in April 2010, [social worker], a licensed social worker, noted that [Student]'s classroom behaviors were, at times, inhibiting [Student] from accessing academic learning as well as social learning. And that when [Student] exhibits these behaviors [Student] typically does not stop until [Student] wears [him/her]self out.

29. Everyone was in agreement that a new BIP was needed and that an autism specialist should be part of the team. A behavior plan meeting was scheduled for May 10, 2010 and a draft BIP was prepared by the District. The parents did not attend the May 10 meeting.

30. On May 1, 2010 the parents notified [Director], Director of Special Education for the District, in writing of their intent to withdraw [Student] from [School #2] and place [Student] at the private [Private School] (now [Private School's new name]). In the letter the parents expressed their concerns regarding the lack of academic and social progress [Student] was making at [School #2]. They informed [Director] that

they were obtaining academic and functional performance evaluations and would be seeking tuition reimbursement from the District.

31. On May 19, 2010 [Director] responded requesting that the team convene another IEP meeting as soon as possible to discuss the family's concerns. [Director] also requested copies of [Student]'s academic and functional performance tests for the IEP team to consider the information and determine if additional evaluative data would be necessary and/or appropriate.

32. When [Director] wrote the May 19, 2010 letter to the parents he was unaware that [Student] had already been withdrawn from [School #2] on May 7, 2010. In light of the new information, [Director] told the parents that if they decided to reenroll [Student] in the District, the District would convene an IEP meeting as expeditiously as possible and stand ready to serve [Student].

33. Despite the fact that [Student] was now attending [Private School], the District went ahead with the May 10 meeting and developed a new BIP for [Student], which remains in draft form but was shared with the staff at [Private School].

34. [Student] began classes at [Private School] on May 10, 2010. [Student] was placed in the [ ] classroom.

35. [Private School] specializes in working with autistic students to help them acquire skills for independence in the school and community settings as well as improve social interactions and social learning.

36. At [Private School], [Student] has a 1:1 student to teacher ratio and is one of eight special needs students in [Student's] class. Aside from occasional field trips, [Student] does not engage with non-disabled children during [Student's] school days at [Private School].

37. Each day the [Private School] classroom staff collects data on each student's IEP objectives to assess progress. The raw data is compiled and graphed, charting each student's progress. [Student]'s progress reports from [Private School] are quite extensive and contain documented, detailed, daily information about [Student's] progress.

38. When [Student] came to [Private School], the only IEP [Student] had was the one that was developed by the District on April 13, 2010. [Private School] chose not to develop a new IEP for [Student] until they had had a chance to observe and evaluate [Student]. The [Private School] staff spent the first six to eight weeks following [Student]'s enrollment observing [Student]. Between May 12, 2010 and August 1, 2010 the staff at [Private School] observed and collected data on [Student].

39. [Student]'s disruptive behaviors that were observed and documented by [Private School] are the ones previously identified by the District and are addressed in the District's May 2010 draft BIP, which include dropping, eloping, climbing, loud vocalization, crying, property destruction, verbal and physical aggression, self-injurious behavior, and perseverative language.

40. In July 2010, the [Private School] staff tested [Student] on the goals and objectives in the District's April 13, 2010 IEP, using the same measurement criteria developed by the District's IEP team. The [Private School] team concluded that [Student] had mastered many of the objectives in the April 13, 2010 IEP, including 4 language arts objectives, one physical objective and one inter- intra-personal objective.

41. With the participation of the [Private School] IEP team and the parents, the District convened another IEP meeting on November 16, 2010. Many of the same goals in the April 13, 2010 IEP were incorporated into the District's November 16, 2010 IEP but again the objectives and criteria had been modified to reflect [Student]'s academic progress. The parents rejected the District's November 16, 2010 IEP and elected to keep [Student] enrolled at [Private School]. [Student] remains at [Private School] and [Student's] parents are seeking tuition reimbursement from the District.

42. The District is responsible for providing [Student] with a FAPE. If it fails to do so, it may be responsible for paying the cost of private placement elsewhere.

43. In this case, the ALJ finds that the credible and persuasive evidence establishes that [Student] made progress towards [Student's] academic and functional goals in [Student's] IEPs during the time [Student] was enrolled in the District and that the District was providing a FAPE. This does not mean that [Student] achieved every objective in [Student's] IEPs or that [Student] made progress on every goal,

but the evidence shows that [Student] received some educational benefit while enrolled in the District.

44. The District provided ongoing progress reporting to the parents consistent with the quarterly reporting it provided to other parents of students who received report cards. The District also provided the parents with an opportunity to fully participate in the drafting of [Student]'s IEPs.

45. The credible and persuasive evidence further establishes that the District's April 13, 2010 IEP goals are clear and measurable. They are supported by short-term objectives, all of which contain measuring criteria and baseline functioning. This fact is supported by the testimony of the [Private School] witnesses who testing [Student]'s performance on the April 13, 2010 goals.

46. Shortly after [Student] was enrolled at [Private School] the staff concluded and it is found as fact that [Student] had made progress towards and even mastered several of the objectives in the District's April 13, 2010 IEP. [Private School] was able to draw these conclusions by relying on the goals, objectives and criteria in the District's IEP.

47. There is no question that [Student] has made progress at [Private School] particularly in reducing [Student's] anxieties and conquering some of [Student's] fears. The [Private School] team has developed specific programs targeted to address [Student]'s anxieties around using public restrooms, reacting to spills, riding in airplanes and encountering dogs. Of particular note, recently, [Student] was able to access the airport and board a plane with

[Student's] family for a family vacation. [Student] has also been able to use public restrooms with much less anxiety. But the fact that [Student] was making greater behavioral progress at [Private School] does not mean that [Student] was not receiving a FAPE at [School #2].

48. [Student]'s compulsions and avoidance behaviors can and have interfered with [Student's] learning. [Student's] behavioral problems began to escalate in 2008 and became so severe in 2010 that the District sought help from an autism specialist. A new BIP was drafted, but never implemented because [Student] was no longer enrolled in the District at the time it was created. If [Student] returns to the District, it is clear that [Student] needs a well-developed BIP to ensure that [Student's] behaviors do not impeded [Student's] educational opportunities.

49. Although the District was unable to find a long-lasting solution to [Student]'s increasing behavioral problems prior to May 7, 2010, the ALJ finds that the District worked collaboratively with the parents and other service providers to address [Student]'s behaviors as they arose.

DISCUSSION

The IDEA was enacted to ensure that all children with disabilities have access to "a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). A free appropriate public education ("FAPE") is defined as "special education and related services . . . provided in conformity with an individualized education program."

20 U.S.C. § 1401(9). The individualized education program ("IEP") is the basic mechanism through which the school district's obligation of providing a FAPE is achieved. *Murray by & Through Murray v. Montrose County Sch. Dist. RE-1J*, 51 F.3d 921, 925 (10th Cir. 1995). The local school district is required to develop, implement and annually revise an IEP that is calculated to meet the student's specific needs and educate that student in the "least restrictive environment", meaning that, "[t]o the maximum extent appropriate," disabled children should be educated in public school classrooms alongside children who are not disabled." 20 U.S.C. §§ 1414(d) and 1412(a)(5)(A).

Under the IDEA, a complainant has the burden of proving by a preponderance of the evidence that the District failed to provide the student with a FAPE. *Thompson R2-J Sch. Dist. V. Luke*, 540 F.3d 1143, 1148 (10th Cir. 2008). It is determined that a school district has provided a disabled student with a FAPE when demonstrable evidence from the student's educational records establishes that the student made some measureable progress on the goals and objectives in [Student's] IEP. *Id.* In this case, since the parents are seeking private school tuition reimbursement, they have the burden of establishing that the District's educational plan was not reasonably calculated to provide [Student] to some educational benefit.

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court examined the issue of what is meant by the phrase "free appropriate public education". In that decision the Court held that the statutory definition of FAPE

requires states to provide each child with specially designed instruction and expressly requires the provision of such supportive services as may be required to assist a handicapped child to benefit from special education. *Id.* at 201. The Court also held that the requirement that a state provide specialized educational services to disabled children generates no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children; the school district's obligation extends only so far as to provide a basic floor of opportunity consisting of specialized instruction and related services that are individually designed to accord some educational benefit *id.* at 200.

Individualized Education Program

In order to comply with the requirements of the IDEA, a school district shall insure that each handicapped child's educational placement: Is determined at least annually; is based on his or her IEP; and is as close as possible to the child's home. See 20 U.S.C. § 1412(5)(B). The IEP consists of a written document containing:

(A) a statement of the present levels of educational performance of such child;

(B) a statement of annual goals, including short-term instructional objectives;

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs;

(D) the projected date for initiation and anticipated duration of such services; and

(E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1401(a)(19).

The parents argue that the District's April 13, 2010 IEP was deficient and not reasonably calculated to provide [Student] an appropriate education. They state that they rejected the April 13, 2010 IEP because [Student] had made little to no progress on [Student's] goals and objectives over the past few years and that the April 13, 2010 IEP provided no substantive change from the previous years' IEPs. The parents assert that the increasing gaps in [Student]'s education were becoming more pronounced and even evidencing regression. The parents also argue that the goals in the Districts IEPs over the years were too vague to be measured, that they were not, in fact, measured and that the IEPs lacked adequate data on [Student]'s progress. For the following reasons, the ALJ is not persuaded by the parents' arguments.

It is true that most, if not all, of the annual goals in [Student]'s IEPs between 2007 and 2010 are the same or similar. Each IEP contains several language arts, math, communication and basic language skills, physical and self-advocacy/self-determination goals. The goals are generally defined, but they are not so broadly written as to be vague. By way of example, one of the continued language arts goals is, "the student will improve writing skills as measured by the

following objectives:"; and, one of the continued math goals is, "the student will communicate an understanding of number sense as measured by the following objectives:" The District's IEP team recommended continuing [Student]'s annual goals from year-to-year because they remained an appropriate component of [Student's] educational plan. And, while the goals remained the same, the objectives and the measuring criteria changed from year-to-year taking into account [Student]'s progress. As [Student] progressed, the objectives were modified or replaced with new objectives and/or the measuring criteria were modified to reflect a higher level of expectation. Sometimes [Student] did not make progress towards [Student's] goals and in those instances the team recommended continuing the objective to the following year.

The IDEA does not guarantee outcomes and an IEP does not have to provide the best conceivable education. The IDEA is designed to provide a floor not a ceiling. An IEP meets the requirements of the IDEA if it is reasonably calculated to enable the child to receive educational benefit by furnishing a basic opportunity for an individually structured education. *Rowley*, 458 U.S. at 206-7. The goals and objectives in [Student]'s April 13, 2010 IEPs are both clear and objectively measurable and [Student] was making progress towards those goals. The most persuasive evidence of this came from the [Private School] witnesses. Shortly after [Student]'s enrollment at [Private School], in July 2010, [Private School] used the District's goals, objectives and criteria in the April 13, 2010 IEP to evaluate [Student]'s academic and

functional performance. The [Private School] staff concluded that [Student] had made progress towards and/or mastered several of the goals/objectives in [Student's] IEP. [Private School] also adopted several of the District's goals and objectives, some with modifications, into its own IEP later that fall. Both the District's and [Private School]'s educational records show that [Student] was making some measureable progress on the goals and objectives in [Student's] April 13, 2010 IEP.

The parents are also critical of the lack of progress reporting contained in the IEPs. In this regard, the ALJ finds some merit in their argument. The 2006 IDEA Part B regulations require that every IEP include a description of how the child's progress toward meeting the annual goals will be measured; and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided. 34 C.F.R. 300.320 (a)(3).

The IEPs produced in this case contain some information in the progress reporting section about [Student]'s progress, but many of the entries are lacking in detail or contain only conclusory statements about whether [Student] was on target to meet the goal. Even [Director], the District's Director of Special Education, stated that he would have liked to have seen a little more substantive information in the progress reporting sections. That being said, however, it is the IEP team, not IDEA regulations that determine the frequency and content of the reports. 34 C.F.R. 300.320 (a)(3)(i).

In addition to the progress reporting information in the IEPs, [special education teacher] testified that she sent home periodic reports regarding [Student]'s progress throughout the year. [Mother] stated that she did not remember receiving any such reports; however, she did state that she was provided with copies of [Student]'s draft IEPs prior to each year's IEP meeting. There is no reason to believe [special education teacher] did not do as she stated nor is there any reason to believe that the parents did not receive any such reports. The fact remains, however, that the parents were provided all of [Student]'s draft IEPs prior to each meeting, were in constant communication with [special education teacher] either through face-to-face meetings or the back and forth notebook, and were able to meaningfully participate with the District in directing [Student]'s education.

Failure to comply with the progress reporting practices of the IDEA can amount to a substantive denial of FAPE or a procedural violation that may or may not deny FAPE. In *Beaverton School Dist.*, 30 IDELR 740 (SEA OR 1999), it was determined that a district's failure to provide a parent with a student's periodic reports was a procedural violation that did not constitute a denial of FAPE because the student continued to receive appropriate services and it did not deprive the parent of meaningful participation in directing her child's education. In the instant case, the ALJ concludes the same. While the District's progress reporting could have been more robust and informative, the absence of more detailed reports does not amount to a substantive denial of a FAPE.

Behavioral Intervention Plan

The parents contend that the District failed to comply with the IDEA by not performing a functional behavioral assessment ("FBA") in order to develop a behavior plan to address [Student] increasing problem behaviors. A behavioral intervention plan ("BIP") is a set of interventions, supports and strategies designed to assist a student whose behavior impedes [Student's] own learning or the learning of others. 34 C.F.R. 300.324 (a)(2)(i). The IDEA requires districts to consider the need for a BIP when a student exhibits problem behavior, but it does not mandate the BIP's format or contents. Districts have broad discretion in developing BIPs, which are to be done on a case-by-case basis, taking into account the particular student's behavioral needs. 34 C.F.R. 300.530 (a).

There is no dispute that, at times, [Student]'s behavioral problems interfered with [Student's] learning process. [Student] has exhibited disruptive classroom behaviors since, at least, 2007. [Student]'s 2007 IEP contains a BIP, which remained part of this IEP in the following years. [Student]'s problem behaviors began increasing in frequency and duration when [Student] transferred from [School #1] to [School #2] but [Student] did not start engaging in more severe self-harming behaviors until 2009. At that time, both the District and the parents had multiple discussions about what to do, including bringing in an autism specialist. By the spring of 2010 and based on observations of the school's social worker, [social worker], the IEP team took steps to modify [Student]'s BIP. A behavior plan meeting was scheduled for May 10, 2010 and a new draft BIP was prepared by the

District. The parents did not attend the May 10 meeting, however, as they had already made the decision to remove [Student] from [School #2] and enroll [Student] at [Private School].

The record does not establish whether the District performed a FBA either prior to implementing [Student]'s 2007 BIP or thereafter. However, a failure to do so would not necessarily violate the IDEA. Neither a FBA nor a BIP are required components of an IEP. 34 C.F.R. 300.320. And the only time the a district is required to perform a FBA is when the district, the parent(s) and member of the IEP team determine that a student's conduct – the conduct giving rise to a change in placement (i.e. removal for 10 or more consecutive school days or a series of removals that constitute a pattern) - was a manifestation of the student's disability. 34 C.F.R. 300.530(f). [Student]'s change in placement was a unilateral one made by [Student's] parents based on an allegation that the District failed to provide a FAPE. The change in placement at issue in this proceeding does not trigger the mandatory FBA requirements of 34 C.F.R. 300.530(f). Therefore, any failure on the part of the District to perform a FBA does not violate the IDEA.

Least Restrictive Environment

In addition to providing personalized instruction for a handicapped child, a state must comply with the IDEA's requirement that this personalized instruction be provided in the least restrictive environment ("LRE"). In order to do so, a state must adopt:

> [P]rocedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(5)(B) (Supp. 1991).

Under Colorado law, each public agency must ensure that—

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
>
> Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

1 CCR § 301-8, 2220-R-5.02; 34 C.F.R. 300.114 (a)(2)(i) and (ii).

In *L.B. v. Nebo Sch. Dist.*, 379 F.3rd 966, 978 (10th Cir. 2004), the parents of a child diagnosed with

autism, unilaterally removed their child from the Nebo School District and placed her at their own expense in a private preschool. Although the student's parents generally agreed with the goals in Nebo's proposed IEP, they disagreed with Nebo's proposal to place their child at Park View. Park View is a special education preschool populated primarily by disabled students, but includes thirty to fifty percent typically developing children who interact throughout the school day with the disabled children. Following the due process hearing, the hearing officer found that Nebo did not violate the LRE requirement and that Appellants had failed to present evidence that the student was progressing on her IEP at the private preschool. *Nebo* at 973. Appellants challenged that finding on appeal. The Tenth Circuit Court concluded that Park View was not the student's least restrictive environment. *Id.* at 975.

In its decision in *Nebo*, the court held:

> In enacting the IDEA, Congress explicitly mandated, through the least restrictive environment requirement, that disabled children be educated in regular classrooms to the maximum extent appropriate. 20 U.S.C. § 1412(a)(5)(A). . . Educating children in the least restrictive environment in which they can receive an appropriate education is one of the IDEA's most important substantive requirements. (citing *Murray v. Montrose County Sch. Dist.*, 51 F3d 921, 926 (10th Cir. 1995)). Thus, the LRE requirement is a specific statutory mandate. It is not, as the district

> court in this case mistakenly believed, a question about educational methodology.

Nebo at 976.

In the instant case, the evidence shows that the District developed, implemented and annually revised an IEP that was calculated to meet [Student]'s specific needs and educate [Student] in the least restrictive environment. The ALJ concludes that [Student]'s placement at the District complies with the LRE mandate of the IDEA.

CONCLUSIONS OF LAW

1. A hearing officer's determination of whether a student received a FAPE must be based on substantive grounds. 34 C.F.R. 300.513 (a)(1). In matters alleging a procedural violation, a hearing officer may find that a student did not receive a FAPE only if the procedural inadequacies – (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provisions of a FAPE to the parent's child; or (iii) caused deprivation of educational benefit. 34 CFR 300.513 (a)(2)(i) – (iii).

2. District developed, implemented and annually revised an IEP that was calculated to meet [Student]'s specific needs and educate [Student] in the least restrictive environment.

3. The District's April 13, 2010 IEP contained goals and objectives that were reasonably calculated for [Student] to receive educational benefit.

4. [Student] made some academic progress towards the goals in [Student's] April 13, 2010 IEP while [Student] was enrolled in the District.

5. The District offered [Student] a FAPE as required by the IDEA.

DECISION

A local education agency (LEA) is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a FAPE available to the child and the parents elected to place the child in a private school or facility. 34 CFR 300.148 (a). The ALJ concludes that the Complainants have not met their burden of establishing a claim for tuition reimbursement or related travel expenses associated with the costs of [Student]'s unilateral private school placement.

This Decision is the final decision except that any party has the right to bring a civil action in an appropriate court of law, either federal or state, pursuant to 34 C.F.R. 300.516.

DATED AND SIGNED

July ____, 2012

MICHELLE A. NORCROSS
Administrative Law Judge

APPENDIX D

FILED
United States Court of
Appeals Tenth Circuit
September 24, 2015
Elisabeth A. Shumaker
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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ENDREW F., a minor, by and through his parents and next friends, JOSEPH F., and JENNIFER F., Plaintiffs-Appellants, v. DOUGLAS COUNTY SCHOOL DISTRICT RE-1, Defendant-Appellee.	No. 14-1417

ORDER

Before **HARTZ**, **TYMKOVICH**, and **PHILLIPS**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the petition is also denied.

Entered for the Court

Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

RECORD AND BRIEFS

SUPREME COURT, U.S.
FILED
APR 15 2016
OFFICE OF THE CLERK

No. 15-827

IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

W. STUART STULLER
Counsel of Record
CAPLAN AND EARNEST LLC
1800 Broadway
Suite 200
Boulder, CO 80302
(303) 443-8010
sstuller@celaw.com

Counsel for Respondent

April 15, 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq*.

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STATEMENT OF THE CASE

A. Procedural Posture

Joseph and Jennifer F., on behalf of their son, Petitioner Endrew F., initiated an administrative action under the Individuals with Disabilities Education Act (IDEA),[1] contending that Respondent Douglas County School District RE-1 did not provide Endrew with a free appropriate public education within the meaning of the IDEA. An administrative law judge (ALJ) ruled in favor of the School District. Petitioner initiated an action for review in federal court. The district court affirmed the ALJ's decision. Petitioner appealed to the Tenth Circuit Court of Appeals which also affirmed. Petitioner asks this Court to review the Tenth Circuit's decision.

B. Statement of Facts

Endrew is a child with autism, a disability that impacts his cognitive functioning, as well as his language, social, and adaptive skills, making him eligible for the protections of the IDEA. Pet. App. 60a; 20 U.S.C. § 1401(3). He attended the School District's preschool program, kindergarten, first, and second grade. During first and second grade, he received approximately twenty hours a week of specialized services and was assigned a full-time paraprofessional to keep him on task and to deescalate his disruptive behaviors. Pet. App. 61a-62a. He progressed academically and socially, but continued to exhibit problem behaviors such as tantrums, yelling, elopements, and unplanned urinations. Pet. App. 63a.

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[1] 20 U.S.C. §§ 1401-1482.

Endrew transferred to his neighborhood school for his third grade year. Pet. App. 64a. The transition was difficult. His maladaptive behaviors continued, but he progressed academically. Pet. App. 64a-65a. The following year his problem behaviors increased, but he continued to progress toward his academic and functional goals. Pet. App. 66a-67a.

A new individualized education program or IEP, dated April 13, 2010, was drafted with goals that were nearly identical to the previous year's goals. Pet. App. 66a-67a. The goals were written in broad terms such as "the student will improve writing skills as measured by the following objectives." Pet. App. 76a-77a. While the goals remained the same, the objectives were changed to reflect higher expectations. Pet. App. 77a.

In May, Endrew's parents notified the School District that they intended to enroll Endrew in a private school, expressing concern about his academic and social progress. Pet. App. 67a-68a. In July, Endrew's private school found that he had mastered many of the objectives on his public school IEP. Pet. App. 71a. The private school later adopted several of the goals and objectives from the School District's IEP into its own IEP. Pet. App. 78a.

Endrew's parents initiated an action under the IDEA seeking reimbursement for the cost of Endrew's private school.

C. Proceedings Below

The IDEA requires school districts to make a free appropriate public education available to children with disabilities. 20 U.S.C. § 1414(a)(1)(A). A free

appropriate public education consists of special education and related services that are provided pursuant to a properly developed individualized education program (IEP). 20 U.S.C. § 1401(9). A school district provides a free appropriate public education to a child with a disability if it develops the child's IEP in accordance with the Act's procedures and the IEP is "reasonably calculated to enable the child to receive educational benefits." *Bd. of Educ. of Hendricks Hudson Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982).

Parents who believe that the local school district is not providing their child with a free appropriate public education may enroll the child in a private school and obtain reimbursement from the school district for the cost of the private school if they prove that the school district did not provide their child with a free appropriate public education. 20 U.S.C. § 1412(a)(10)(C)(ii).

Endrew's parents argued that Endrew did not receive a free appropriate public education pointing to IEP goals that changed little over the years. Pet. App. 76a. The ALJ, however, found that the goals were written in broad terms that incorporated underlying objectives, *e.g.*, "the student will improve writing skills as measured by the following objectives." Pet. App. 76a-77a. The ALJ explained: "[W]hile the goals remained the same, the objectives changed from year-to-year taking into account [Endrew]'s progress. As [Endrew] progressed, the objectives were modified or replaced with new objectives and/or the measuring criteria were modified to reflect a higher level of expectation." Pet. App. 77a.

The ALJ ruled:

> An IEP meets the requirements of the IDEA if it is reasonably calculated to enable the child to receive educational benefit by furnishing a basic opportunity for an individually structured education. *Rowley*, 458 U.S. at 206-07. The goals and objectives in [Endrew]'s April 13, 2010 IEP are both clear and objectively measurable and [Endrew] was making progress toward those goals. The most persuasive evidence of this came from the [Private School] witnesses. Shortly after [Endrew]'s enrollment at [Private School], in July 2010, [Private School] used the District's goals, objectives and criteria in the April 13, 2010 IEP to evaluate [Endrew]'s academic and functional performance. The [Private School] staff concluded that [Endrew] had made progress towards and/or mastered several of the goals/objectives in [Endrew's] IEP. [Private School] also adopted several of the District's goals and objectives, some with modification, into its own IEP later that fall. Both the District's and the [Private School]'s education records show that [Endrew] was making some measurable progress on the goals and objectives in [Endrew's] April 13, 2010 IEP.

Pet. App. 77a-78a.[2]

The ALJ denied the parents' request for reimbursement.

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[2] Endrew's parents also raised procedural issues. Pet. App. 78a-81a. The Petition does not seek review of any procedural rulings.

Endrew's parents initiated an action for judicial review of the ALJ's decision. The district court reviewed the underlying testimony and exhibits, and affirmed the ALJ's decision, stating that the parents failed to prove that the District's IEP "was not reasonably calculated to provide *some* educational benefit." Pet. App. 41a-51a (emphasis added).

Endrew's parents appealed to the Tenth Circuit Court of Appeals arguing that a recent Tenth Circuit decision, *Jefferson Cnty. School District v. Elizabeth E.*,[3] had adopted the "meaningful benefit" standard, marking a "fundamental shift" in circuit precedent. Pet. App. 19a. The Tenth Circuit rejected their contention, explaining that its references to "meaningful" in *Elizabeth E.* did not represent a change in the circuit's approach, adding, "Although the 'meaningful benefit' standard is purportedly higher than the 'some benefit' standard, the difference between them – that is, how much *more* benefit a child must receive for it to be meaningful – is not clear." Pet. App. 17a, n.8 (emphasis in original). The Tenth Circuit affirmed the district court's decision.

REASONS FOR DENYING THE PETITION

Thirty-four years ago, this Court addressed the following question: "What is meant by the [Individuals with Disabilities Education Act]'s[4] requirement of a 'free appropriate public education.'" *Rowley*, 458 U.S.

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[3] 702 F.3d 1227 (10th Cir. 2012), *cert. denied*, 133 S.Ct. 2857 (2013).

[4] At the time, the Act was known as the "Education for All Handicapped Children Act of 1975." *Rowley*, 458 U.S. at 180. The Act received its current name in 1990. *See* Pub.L. 101-476, Section 901(a)(1), 104 Stat. 1103, 1141-42 (1990). This brief will refer to all iterations of the Act as the IDEA.

at 186. The Petition asks the Court to give a different answer to a question that the Court already has answered.

I. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Congress enacted the IDEA pursuant to its Spending Clause power. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295 (2006). The IDEA provides federal funds to states, but conditions the funding on states' compliance with the requirements of the Act. *Rowley*, 458 U.S. at 179. When Congress uses its Spending Clause authority to attach conditions to federal funding, it must set out the conditions clearly and unambiguously. *Murphy*, 548 U.S. at 296.

The IDEA requires states to make a "free appropriate public education" available to children with disabilities. 20 U.S.C. § 1412(a)(1)(a). Consistent with the clarity required by the Spending Clause, the Act expressly defines free appropriate public education:

> The term "free appropriate public education" means special education and related services that—
>
> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(9). The Act also expressly defines "special education"[5] and "related services,"[6] and details the procedures that schools must follow in developing a child's individualized education program or IEP. 20 U.S.C. § 1414(d). An IEP is a planning document that identifies the child's levels of achievement and performance, goals, and the special education and related services that will be provided so that the child can progress toward those goals. 20 U.S.C. § 1414(d)(1)(A)(i).

In short, the IDEA's procedural requirements are a model of Spending Clause clarity. The question posed by the Petition, and previously answered by *Rowley*, is to what extent does the IDEA impose *substantive* requirements regarding educational outcomes.

II. THE *ROWLEY* DECISION

Rowley focused its analysis on the statutory definition of a free appropriate public education, noting that the Act expressly defined the term, and defined its constituent parts. 458 U.S. at 187-190. The Court observed: "Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children." *Id.* at 189. The Court explained:

> By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access

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[5] 20 U.S.C. § 1401(26).

[6] 20 U.S.C. § 1401(19).

> meaningful. Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome." S. Rep. No. 94-168 [(1975)], at 11. Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

Id. at 192; *see also id.* at 200 (quoting H.R. Rep. No. 94-332 [(1975)] at 14, "no congressional legislation has required a precise guarantee for handicapped children").

The Court recognized that it would do little good for Congress to spend millions of dollars to provide access to public education if disabled children received no benefit from that education. *Id.* at 200. Therefore, "[i]mplicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Id.*

Rowley established a two-part test to determine whether a child has received a free appropriate public education:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied

> with the obligations imposed by Congress and the courts can require no more.

Id. at 206-07.

Recognizing that the Act covered children with challenges that ranged from the mild to the profound, the Court declined to establish a single test to determine the adequacy of educational benefits required by the Act. *Id.* at 202.

III. CONGRESS AND *ROWLEY*

Congress can overrule or modify *Rowley* if it wishes to do so. *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015). Congress has amended the IDEA five times since *Rowley* but never expressed concern with this Court's decision or changed the definition of free appropriate public education. *See generally* Pub.L. No. 98-199, 97 Stat. 1357 (1983); Pub.L. No. 99-457, 100 Stat. 1145 (1986); Pub.L. No. 101-476, 104 Stat. 1103 (1990); Pub.L. No. 105-17, 111 Stat. 37 (1997); Pub.L. No. 108-446, 118 Stat. 2647 (2004).

Some persons have argued that legislative changes that do not address the IDEA's definition of free appropriate public education have changed *Rowley*. *Lessard v. Wilton Lyndeborough Sch. Dist.*, 518 F.3d 18, 27-28 (1st Cir. 2008) (rejecting contention that 1997 amendment of definition of "transition services" overruled *Rowley*). Given that the IDEA is Spending Clause legislation, requiring Congress to clearly and unambiguously state its requirements,[7] it is unlikely that Congress would, or could, change the central requirement of the IDEA in such an elliptical manner. *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 950 (9th Cir. 2009).

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[7] *Murphy*, 548 U.S. at 296.

Moreover, when Congress changes a statute in response to a Supreme Court decision, it generally does so explicitly. *See, e.g.*, Pub.L. No. 111-2, 123 Stat. 5 (Lilly Ledbetter Fair Pay Act of 2009) (responding to *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)); Pub.L. No. 103-141, 107 Stat. 1488 (Religious Freedom Restoration Act of 1993) (responding to *Employment Div. v. Smith*, 494 U.S. 872 (1990)). Indeed, when this Court held in *Smith v. Robinson* that the IDEA was the exclusive avenue through which children with disabilities could pursue claims related to their education and that attorney fees were not available under the Act,[8] "Congress read the Supreme Court's decision in *Smith* and acted swiftly, decisively, and with uncharacteristic clarity to correct what it viewed as a judicial misinterpretation of its intent." *Fontenot v. Louisiana Bd. of Elementary & Secondary Educ.*, 805 F.2d 1222, 1223 (5th Cir. 1986); *see generally* Pub.L. No. 99-372, 100 Stat. 796; codified at 20 U.S.C. § 1415(i)(3)(B)(i) (attorneys fees); 20 U.S.C. § 1415(l) (preserving claims under other laws).

In short, Congress regards *Rowley* as settled law.

The Petition, however, argues that *Rowley* must be revisited because the federal circuits are in "disarray" over its meaning. Pet. 9.

IV. THE "SPLIT" IS NOT GENUINE OR OUTCOME DETERMINATIVE

A. Every Circuit Applies the Central Holding of *Rowley*.

The standard set by *Rowley*—"reasonably calculated to enable the child to receive educational benefits"—is

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[8] 468 U.S. 992, 1009-10, 1013 (1984).

followed by every circuit in the federal system. *Leggett v. District of Columbia*, 793 F.3d 59, 70 (D.D.C. 2015) ("[A]n IEP is generally 'proper under the Act' if 'reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 207); *Lessard*, 518 F.3d at 27 (First Circuit) ("[W]e start with the *Rowley* Court's mandate that IEP components must be 'reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 207); *Reyes v. New York Dep't of Educ.*, 760 F.3d 211, 221 (2d. Cir. 2014) (school districts must "formulate an IEP that is 'reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 207); *D.S. v. Bayonne Bd. of Ed.*, 602 F.3d 553, 564 (3d. Cir. 2010) ("[A] reviewing court must . . . determine whether the educational program was 'reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 207); *M.S. v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009) ("[A]n IEP must ultimately be 'reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 207); *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583-84 (5th Cir. 2009) ("The court must . . . determine whether the IEP developed through such procedures was 'reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 207), *cert. denied*, 559 U.S. 1007 (2010); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 763 (6th Cir. 2001) ("[T]he court must determine whether the IEP, developed through the IDEA's procedures, is reasonably calculated to enable the child to receive educational benefits.") (citing *Rowley*, 458 U.S. 207), *cert. denied*, 533 U.S. 950; *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist.*, 375 F.3d 603, 613 (7th Cir.

2004) ("[A]n IEP is valid when . . . it is 'reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 207), *cert. denied*, 543 U.S. 1009 (2004); *Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir. 2006) ("To pass substantive muster, the IEP must be 'reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 206-07); *K.D. v. Dep't of Educ.*, 665 F.3d 1110, 1122 (9th Cir. 2011) ("The court must determine . . . whether the state developed an IEP that is 'reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 207); *Sytsema ex rel. Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306, 1315 (10th Cir. 2008) ("[F]ederal courts must determine whether a school district substantively complied with the Act by focusing on whether 'the [IEP] developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 207); *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1182 (11th Cir. 2014) ("[T]he IEP must be 'reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 207).

B. Different Adjectives Do Not Represent Different Standards.

The "split" identified by the Petition is not a genuine outcome-determinative split. Rather, the "split" is one of adjectives, not outcomes. An examination of the relevant case law demonstrates that the different circuits use different adjectives to describe the same core requirement of *Rowley* that a child's IEP must be "reasonably calculated to enable the child to receive educational benefits." 458 U.S. at 207. Every circuit

follows this command, and no circuit has strayed from *Rowley*'s central holding.

The Petition labels the allegedly conflicting standards as the "substantial benefit" standard and the "just above trivial benefit" standard. Pet. 10-11. These labels, of course, are simply more adjectives. Moreover, they are adjectives selected by the Petition, not referenced by the circuits to which they are attributed. The Petition attributes the "substantial benefit" label to the Third Circuit. Pet. 10. The Third Circuit, however, has never used that label in any decision, and generally uses the label "meaningful." *E.g., T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) ("By failing to inquire into whether the Board's IEP would confer a *meaningful* educational benefit . . . .") (emphasis in original). Similarly, the "just above trivial" label is not used by any circuit. Instead, the label attributed to other circuits is "some." *E.g., Thompson R-2J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1149 (10th Cir. 2008) ("Congress sought only to require a basic floor of opportunity, aimed at providing individualized services sufficient to provide every eligible child with *some* educational benefit.") (emphasis in original) (citations and internal quotation marks omitted), *cert. denied*, 555 U.S. 1173 (2009).

The term "meaningful" is drawn from *Rowley*'s statement that "Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access *meaningful*." 458 U.S. at 192 (emphasis added). The term "some" is drawn from *Rowley*'s statement that "the education to which access is provided [must] be sufficient to confer *some* educational benefit upon the handicapped child." *Id.* at 200 (emphasis added).

Rowley, of course, did not establish two conflicting standards. Instead, it spoke of access ("meaningful"), and benefit ("some"), explaining "that the education to which access is provided [must] be sufficient to confer some educational benefit upon the handicapped child." *Id.*; *see also id.* at 214 (White, J., dissenting) ("meaningful access" is provided by an IEP that confers "some educational benefit"); *J.L.*, 592 F.3d at 951 n.2 ("As we read the Supreme Court's decision in *Rowley*, all three phrases refer to the same standard. School districts must, to 'make such access meaningful,' confer at least 'some educational benefit' on disabled students."); *JSK v. Hendry Cnty. Sch. Bd.*, 941 F.3d 1563, 1572 (11th Cir. 1991) ("We disagree to the extent that 'meaningful' means anything more than 'some' or 'adequate' educational benefit.").

Nonetheless, advocates are quick to point to a court's selection of a particular adjective as evidence that the court has made a conscious decision to align itself with a choice that the advocates insist determines the outcome of the case. This is precisely what happened here. The Tenth Circuit used the word "some" to describe the educational benefits required by *Rowley* for nearly twenty years. *Urban ex rel. Urban v. Jefferson Cnty. Sch. Dist. R–1*, 89 F.3d 720, 727 (10th Cir. 1996).

Then, in 2012, the majority and concurring opinions used the word "meaningful" in *Elizabeth E.*,[9] prompting Petitioner to argue that the Tenth Circuit had

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[9] 702 F.3d at 1234, 1238 (Murphy, J., majority opinion); *id.* at 1243 (Gorsuch, J., concurring).

adopted a newer and higher substantive standard.[10] Pet. App. 19a. The Tenth Circuit explained that *Elizabeth E.*'s use of the different adjectives did not represent a sea change, and cautioned that the substantive difference between "some benefit" and "meaningful benefit" is not clear. Pet. App. 17a n.8, 19a-21a.

While the Petition attempts to describe a clear and decisive split, the split is not so clear or decisive that observers agree on what circuits subscribe to what standard. The Petition outlines a split with eight circuits (the First, Second, Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh) applying a "just above trivial" standard, two circuits (the Third and Sixth) applying a "substantial benefit" standard, one circuit (the D.C. Circuit) avoiding adjectives altogether in favor of "educational benefit," and one circuit (the Ninth) using both terms. Pet. 10-14. In contrast, a commentator cited by the Petition[11] describes a split with six circuits (the Second, Third, Fourth, Fifth, Sixth, and Ninth) using "meaningful benefit," four circuits (the First, Eighth, Eleventh, and D.C.) using "some benefit," and one circuit (the Seventh) using both terms. Lester Aron, *Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Public Education after* Rowley*?*, 39 Suffolk U.L. Rev. 1, 7 (2005). Still another commentator outlines a split with seven circuits (the First, Fourth, Seventh,

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[10] It is worth noting that the author of the concurring opinion in *Elizabeth E.*, authored the *Luke P.* decision, that Petitioner contended was overruled by *Elizabeth E. Compare Luke P.*, 540 F.3d at 1149 (Gorsuch, J.) ("*some* educational benefit") (emphasis in original) *with Elizabeth E.*, 702 F.3d at 1243 (Gorsuch, J., concurring) (using "meaningful educational benefit").

[11] Pet. 12-13.

Eighth, Tenth, Eleventh, and D.C.) using "some benefit," one circuit (the Third) using "meaningful benefit," and four circuits (the Second, Fifth, Sixth, and Ninth) using both terms. Ron Wenkart, *The* Rowley *Standard: A Circuit by Circuit Review of How* Rowley *Has Been Interpreted*, 247 Educ. L. Rep. 1 (2009). The only circuit that all three observers identify as using "meaningful benefit" is the Third Circuit.[12] The three authors place the Second and Fifth Circuits in three different categories.[13]

C. Courts Treat the Adjectives as Complementary.

While advocates must use adjectives to their advantage, courts make far less of the adjectives than advocates. The Tenth Circuit is not the only circuit to reflect a lack of fidelity in its choice of adjectives. The First Circuit has used at least three adjectives to describe the educational benefits required by *Rowley*. *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 36 (1st Cir. 2012) ("likelihood that the IEP will confer a *meaningful* educational benefit") (emphasis added); *Lessard*, 518 F.3d at 23-24 ("IEP need only supply '*some* educational benefit'") (emphasis added); *Lt. T.B. ex rel. N.B. v. Warwick Sch. Cmty.*, 361 F.3d 80, 82 (1st

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[12] Pet. 10; Aron, 39 Suffolk U.L. Rev. at 7; Wenkart, 247 Educ. L. Rev. at 17-19.

[13] Pet. 13 (Second Circuit requires "just above trivial benefit"); Aron, 39 Suffolk U.L. Rev. at 7 (Second Circuit requires "meaningful benefit"); Wenkart, 247 Educ. L. Rev. at 19-20 (Second Circuit uses both terms); *see also* Pet. 13 (Fifth Circuit requires "just above trivial benefit"); Aron, 39 Suffolk U.L. Rev. at 7 (Fifth Circuit requires "meaningful benefit"); Wenkart, 247 Educ. L. Rev. at 22-23 (Fifth Circuit uses both terms).

Cir. 2004) (IEP must be "reasonably calculated to provide an *appropriate* education") (emphasis added).

Courts routinely treat the different adjectives as complementary terms, not outcome-determinative distinctions:

> The Supreme Court has said that an IEP must offer only "*some educational benefit*" to a disabled child. Thus, the IDEA sets "modest goals: it emphasizes an *appropriate* rather than an ideal, education; it requires an *adequate*, rather than an optimal, IEP." At the same time, the IDEA calls for *more than a trivial* educational benefit, in line with the intent of Congress to establish a "federal basic floor of meaningful, beneficial educational opportunity." Hence, to comply with the IDEA, an IEP must be reasonably calculated to confer a *meaningful* educational benefit.

D.B. v. Esposito, 675 F.3d 26, 34-35 (1st Cir. 2012) (emphases added) (internal citations and parentheticals omitted). The foregoing statement is supported by citations from the allegedly "conflicting" First, Second, Third, and Sixth Circuits without any indication, such as a "*but see*" preface, that these circuits are on opposite sides of an outcome-determinative divide. *Id.*, *citing Lenn v. Portland Sch. Cmty.*, 998 F.2d 1083, 1086 (1st Cir. 1993); *Town of Burlington v. Dep't of Educ. of Mass.*, 736 F.2d 773, 789 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985); *D.S.*, 602 F.3d at 557 (Third Circuit); *D.F. ex rel. N.F. v. Ramapo Cent. Sch. Dist.*, 430 F.3d 595, 598 (2d Cir. 2005); *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005).

The Seventh Circuit is similarly eclectic in identifying its influences:

> An IEP passes muster provided that it is "reasonably calculated to enable the child to receive educational benefits" or, in other words, when it is "likely to produce progress, not regression or trivial educational advancement." *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997) (*quoting Bd. of Educ. v. Diamond*, 808 F.2d 987 (3d Cir. 1986)); *accord Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998). The requisite degree of reasonable, likely progress varies, depending on the student's abilities. Under *Rowley*, "while one might demand only minimal results in the case of the most severely handicapped children, such results would be insufficient in the case of other children." *Hall by Hall v. Vance Cnty. Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985).

Alex R., 375 F.3d at 615. The Seventh Circuit even has conjoined the "conflicting" adjectives. *Hjortness v. Neenah Joint Sch. Dist.*, 507 F.3d 1060, 1065 (7th Cir. 2007) (IEP provided "*some meaningful* educational benefit") (emphasis added), *cert. denied*, 554 U.S. 930 (2008).

The Fifth Circuit asks whether a child's IEP is calculated to yield "positive" educational benefits,[14] a term that has made its way into cases from the

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[14] *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998).

Second,[15] Seventh,[16] and Eleventh[17] Circuits without any indication that "positive educational benefits" differs in some substantive way from "some," "meaningful," "appropriate," or "adequate." *See Sch. Bd. v. K.C.*, 285 F.3d 977, 982 n.6 (11th Cir. 2002) ("It is unnecessary for us to decide whether these [*Cypress-Fairbanks*] factors constitute the test in this circuit because they are at least as stringent as any standard this circuit has articulated.").

Circuits define the different adjectives in remarkably similar ways. For example, the Second Circuit has held that "meaningful benefit" "contemplates more than mere trivial advancement." *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1120-1121 (2d Cir. 1997); *see also P. ex rel. Mr. and Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 130 (2d Cir. 2008) ("IEP must provide the opportunity for more than only 'trivial advancement'"). The Tenth Circuit describes "some benefit" in virtually identical fashion: "This circuit has long subscribed to the *Rowley* Court's 'some educational benefit' language in defining a FAPE, and interpreted it to mean that the educational benefit mandated by IDEA must merely be 'more than *de minimis*.'" Pet. App. 16a. The Fourth Circuit defines "meaningful" in the same fashion as the First

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[15] *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (citing *Cypress-Fairbanks*, 118 F.3d at 253).

[16] *M.B. ex rel. Berns v. Hamilton Southeastern Schs.*, 668 F.3d 851, 862 (7th Cir. 2011) (citing *Cypress-Fairbanks*, 118 F.3d at 253); *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist.*, 375 F.3d 603, 615 (7th Cir. 2004) (citing *Cypress-Fairbanks*, 118 F.3d at 253).

[17] *Sch. Bd. v. K.C.*, 285 F.3d 977, 982-83 (11th Cir. 2002) (citing *Cypress-Fairbanks*, 118 F.3d at 253).

Circuit defines "meaningful,"[18] and uses "some" in the same manner as the Tenth Circuit uses "some." *O.S.*, 804 F.3d at 359 ("[W]e have never held 'some' educational benefit means only 'some minimal academic advancement, no matter how trivial.'").

Other circuits have defined the adjective-free phrase "educational benefits" used in *Rowley* in the same way. *Cypress-Fairbanks*, 118 F.3d at 248 (IEP must be "reasonably calculated to enable the child to receive educational benefits or, in other words, when it is likely to produce progress, not regression, or trivial educational advancement") (Fifth Circuit); *Alex R.*, 375 F.3d at 615 ("IEP is reasonably calculated to enable the child to receive an educational benefit when it is likely to produce progress, not regression or trivial educational advancement") (Seventh Circuit).

While the Tenth Circuit notes the difficulty of distinguishing between "some" and "meaningful,"[19] the Eleventh Circuit does not see any distinction: "We disagree to the extent that 'meaningful' means anything more than 'some' or 'adequate' educational benefit." *JSK*, 941 F.3d at 1572. The Ninth Circuit agrees: "As we read the Supreme Court's decision in *Rowley*, all three phrases refer to the same standard. School districts must, to 'make such access meaningful,' confer at least 'some educational benefit' on disabled students." *J.L.*, 592 F.3d at 951 n.2.

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[18] *O.S.*, 804 F.3d at 359 ("Using 'meaningful,' as the Court also did in *Rowley*, was simply another way to characterize the requirement that an IEP must provide a child with more than minimal, trivial progress.").

[19] *Sytsema*, 538 F.3d at 1313.

D. The Third and Sixth Circuits Are Not Outliers.

The Petition asks the Court to resolve a perceived distinction based on language used by the Third and Sixth Circuits. The proposed distinction, however, is not consequential.

The Third Circuit began with the same understanding as the other circuits: "[W]hen the Supreme Court said 'some benefit' in *Rowley*, it did not mean 'some' as opposed to 'none.' Rather, 'some' connotes an amount of benefit greater than mere trivial advancement." *Polk v. Cent. Susquehanna Inter. Unit 16*, 853 F.2d 171, 183 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). Later, however, the Circuit explained: "[T]he standard set forth in *Polk* requires 'significant learning' and 'meaningful benefit.' The provision of merely 'more than a trivial educational benefit' does not meet these standards." *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Ridgewood did not articulate how much more than "merely more than trivial" is necessary to satisfy the IDEA. A subsequent Third Circuit opinion, however, referred to the *Ridgewood* standard as only "somewhat more stringent," and affirmed a district court's decision that an IEP satisfied the IDEA notwithstanding the fact that the lower court applied the "merely more than trivial" understanding of *Polk*. *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 578 (3d Cir. 2000). Still later, the Third Circuit rejected a parent's argument that a lower court erred by applying the "some benefit" test, stating, "We see no error; indeed, the same language – 'some educational benefit' – is found in our *Kingwood Township* decision. That decision clearly confirmed that 'some educational

benefit' requires provision of a 'meaningful educational benefit,' the standard the ALJ clearly and accurately outlined earlier in her opinion." *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 395 (3d Cir. 2005) (internal citation omitted). Thus, if the Third Circuit has strayed from *Rowley* or other circuits, it has not strayed far, or for long.

The Sixth Circuit initially relied on *Polk* to define "appropriate" to mean "more than *de minimis*,"[20] then later adopted *Ridgewood*'s understanding that "meaningful" means something more than "merely more than trivial." *Deal*, 392 F.3d at 861. *Deal*, however, indicated that *Rowley* was unequipped to address a situation where one methodology (the so-called Lovaas methodology) appeared to offer the hope of self-sufficiency while the school district's methodology did not: "The legislative history cited in *Rowley* provides strong support for a higher standard in a case such as this, where the difference in level of education provided can mean the difference between self-sufficiency and a life of dependence." *Id.* at 861-62, 863. *Rowley*, however, devoted an entire section of the opinion to an exploration of legislative history. 458 U.S. at 191-204. Nothing in that discussion supports *Deal*'s representation of the history. *Id.* at 203 (statutory language and legislative history make clear that schools comply with IDEA "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."). In addition, *Deal*'s willingness to resolve disputes over methodologies ignored *Rowley*'s admonition that "once a court determines that the requirements of the Act have been met, questions of

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[20] *Doe ex rel. Doe v. Smith*, 879 F.2d 1340, 1341 (6th Cir. 1989), *cert. denied*, 493 U.S. 1025 (1990).

methodology are for resolution by the States." *Id.* at 208.

The Petition cites a brief submitted eleven years ago by the National School Boards Association in support of a petition for a writ of certiorari in *Deal* as support for granting this Petition. At the time, *Deal* could be seen as an express call for courts to set for new standards: "Nothing in *Rowley* precludes the setting of a higher standard than the provision of 'some' or 'any' educational benefit." *Deal*, 392 F.3d at 863, *but see Rowley*, 458 U.S. at 189 (substantive standard is "noticeably absent" from statute). Rather than serving as a turning point in IDEA jurisprudence, the passage of time has worn the edges off of *Deal*. The case has been cited by other circuits without any indication that it represents a fundamental shift in IDEA law. *See D.B.*, 675 F.3d at 35 (First Circuit citing *Deal* for the proposition that IEP must be reasonably calculated to confer meaningful educational benefit). The Tenth Circuit cited *Deal* for the proposition that the IDEA requires that IEP must be reasonably calculated to provide meaningful educational benefit, and then added that it is difficult to distinguish between "some benefit" and "meaningful benefit."[21] *Sytsema*, 538 F.3d at 1313.

To the extent that *Deal* caused any repercussions outside of the Sixth Circuit, it was in the Ninth Circuit where a panel cited *Deal* to support the proposition that 1997 amendments to the IDEA required courts to

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[21] Prior to *Deal*, the Sixth Circuit held that a child's IEP satisfied Michigan's "maximum potential" standard notwithstanding the fact that the parents were demanding precisely the same Lovaas methodology. *Renner v. Bd. of Educ.*, 185 F.3d 635, 638, 645-46 (6th Cir. 1999). There has been no indication that *Deal*'s focus on methodology has undermined *Renner*.

apply the meaningful benefit standard. *N.B. v. Hellgate Elementary Sch. Dist., ex rel. Bd. of Dirs., Missoula Cnty., Mont.*, 541 F.3d 1202, 1213 (9th Cir. 2008). It is a curious citation given that *Deal* did not discuss the 1997 amendments at all. Less than a year later, however, the Ninth Circuit reviewed all of the post-*Rowley* amendments to the IDEA, and noted that none of the amendments changed the definition of free appropriate public education or indicated dissatisfaction with *Rowley*. *J.L.*, 592 F.3d at 947-48, 951. The court added:

> Some confusion exists in this circuit regarding whether the Individuals with Disabilities Education Act requires school districts to provide disabled students with "educational benefit," "some educational benefit" or a "meaningful" educational benefit. *See, e.g., N.B. v. Hellgate Elem. Sch.*, 541 F.3d 1202, 1212-13 (9th Cir. 2008). As we read the Supreme Court's decision in *Rowley*, all three phrases refer to the same standard. School districts must, to "make such access meaningful," confer at least "some educational benefit" on disabled students.[22]

Id. at 951 n.2; *Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1058 n.2 (9th Cir. 2012) (same); *see also R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1121, 1123 (9th Cir. 2011) (affirming district court's

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[22] More recently, another panel revived the notion that the 1997 amendments required the use of the meaningful benefit standard but did not contend that "meaningful" means something other than "some." *M.M. v. Lafayette Sch. Dist.*, 767 F.3d 842, 852 (9th Cir. 2014).

decision that IEP provided FAPE to student saying it provided "educational benefit").

As *Rowley* recognized, however, articulating a one-size-fits-all standard is not an achievable goal for a statute that applies to a child for whom learning to eat, dress, and toilet represents education,[23] to a hearing-impaired child whose academic performance is better than the average,[24] and to a child with superior cognitive skills but behavioral challenges who contends that he is not receiving a free appropriate public education because the school's curriculum is "beneath his abilities." *Adam v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 810 (5th Cir. 2003). Minimal progress might be remarkable progress for the first student. *Rowley*, 458 U.S. at 202. In contrast, minimal progress for the third student might be due to factors unrelated to the child's IEP. *See generally Dale M. ex rel. Alice M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307*, 237 F.3d 813, 817 (7th Cir. 2001) (student's lack of educational progress due to socially inappropriate behavior and substance abuse, not educational services).

While courts have used different adjectives to describe the educational benefits required by *Rowley*, *Rowley* has proved to be a remarkably durable decision in a complex and fact-intensive area of the law. There is no reason to disturb *Rowley*, and much danger in doing so.

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[23] *Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 693 (3d Cir. 1981).

[24] *Rowley*, 458 U.S. at 184-85.

V. THE RISKS OF REVISITING *ROWLEY*

The Petition contends that this case is a good vehicle for the Court to distinguish between "some" and "meaningful" benefit because the Tenth Circuit stated that this was a "close case." Pet. 19-21. The word "close," of course, is just another adjective, but an adjective that highlights the difficulty of the challenge presented by the Petition, that is, the challenge of articulating the difference between "some" and "meaningful," the words used by *Rowley*, and the relationship of those words to "appropriate," the word used by the statute.

The Petition argues that the Court can resolve the split by choosing an adjective. Pet. 20. If the Court chooses "some," the Petition concedes that the case is over. *Id.* If the Court chooses "meaningful," the Petition contends that the Court can remand the case to the lower court to apply the new adjective. *Id.* Simply choosing an adjective, however, resolves little. As the Tenth Circuit noted in this case, however, "how much *more* benefit a student must receive for [education] to be meaningful – is not clear." Pet. 17a n.8 (emphasis in original). As Justice White noted in *Rowley*, the word "'meaningful' is no more enlightening than 'appropriate.'" 458 U.S. at 214 (White, J., dissenting).

Here, the administrative hearing lasted three days. The district court's discussion of the evidence covers ten pages. Pet. App. 41a-51a. If this Court is going to recognize a distinction between "some" and "meaningful," and bring clarity to the distinction, it will have to review the entire administrative record, and articulate precisely where the educational benefit conferred by the School District's IEP satisfied "some," but fell short of "meaningful," and articulate that

distinction in a way that can be applied in a principled manner to the 6.5 million IEPs that are created each year. Nat'l Center for Educ. Statistics, Digest of Education Statistics, Table 204.30: Children 3 to 21 Years Old Served under IDEA, Part B (2013), *available at* https://nces.ed.gov/programs/digest/d13/tables/dt13_204.30.asp.

The Petition represents, at most, a complaint from the borderline of a complex and fact-intensive area of law.[25] Different judges can review the same facts under the same standard and still reach conflicting opinions. *See generally K.E. v. Indep. Sch. Dist.*, 647 F.3d 795, 811-22 (8th Cir. 2011) (Bye, J., dissenting). They also can view the same facts under different standards, and reach the same conclusion. *T.R.*, 205 F.3d at 577 (affirming judgment of lower court that IEP satisfied the IDEA notwithstanding the fact that the lower court applied a somewhat less stringent standard). Borderline cases will exist for as long as there are borders. Changing a border will not eliminate borderline cases. If the new border cannot be articulated with greater clarity than the old border, borderline cases will increase.

VI. THE DECISION TO IMPOSE A HIGHER STANDARD BELONGS TO THE LEGISLATURES

Finally, to the extent that the Petition asks the Court to intervene to set a higher substantive standard than *Rowley*, Petitioner has remedies in other forums. First, Congress can amend the IDEA. In addition, the definition of free appropriate public

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[25] The School District does not concede that this case is close. Three different courts – five judges – unanimously ruled in the School District's favor.

education requires that the special education and related services must "meet the standards of the State educational agency." 20 U.S.C. § 1401(9)(B). "If state legislation implementing IDEA creates a higher standard than the federal minimum, an individual may bring an action under the federal statute seeking to enforce the state standard." *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1035 (8th Cir. 2000). Some states have adopted higher standards by statute. *See generally Burilovich v. Bd. of Educ.*, 208 F.3d 560, 565 (6th Cir.) (Michigan has "maximum benefit" standard), *cert. denied*, 531 U.S. 957 (2000); *Renner*, 185 F.3d at 645-46 (same); *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 950 (1st Cir. 1991) (New Hampshire has "equal educational opportunities" standard); *Roland M. v. Concord Sch. Dist.*, 910 F.2d 983, 991-92 (1st Cir. 1990) (Massachusetts has "maximum possible development" standard), *cert. denied*, 499 U.S. 912 (1991); *Cothern v. Mallory*, 565 F.Supp. 701, 706-08 (W.D. Mo. 1983) (Missouri has "maximizes the capabilities" standard). Thus, Petitioner can ask the Colorado General Assembly to impose a higher state standard.[26] Given that IDEA

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[26] The Petition argues that lower court rulings demonstrate that the two standards "have 'produced vastly different results for students with disabilities.'" Pet. 17. The Petition, however, supports this statement with a citation to an article that analyzes a single case. *Id.*, citing Scott F. Johnson, Rowley *Forever More? A Call for Clarity and Change*, 41 J.L. & Educ. 25, 32-39 (2012) (discussing *J.L. v. Mercer Island School District*, 592 F.3d 938 (9th Cir. 2010)). The case analyzed by the article, however, held that there is no substantive distinction between "some" and "meaningful." *J.L.*, 592 F.3d at 951 n.10. Thus, the author's analysis is based on a distinction that was not recognized by the court.

Perhaps more revealing is the fact that cases applying "maximum benefit" standards do not represent outliers on the

funding covers only a small portion of the cost of the IDEA's obligations,[27] the decision to increase substantive IDEA standards inevitably requires states to spend state, not federal, money. The decision should be made the states, not federal courts.

CONCLUSION

WHEREFORE, the Douglas County School District RE-1 respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

W. STUART STULLER
Counsel of Record
CAPLAN AND EARNEST LLC
1800 Broadway
Suite 200
Boulder, CO 80302
(303) 443-8010
sstuller@celaw.com

Counsel for Respondent

April 15, 2016

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spectrum of IDEA decisions. *Burilovich*, 208 F.3d at 565 (child's IEP satisfied Michigan's "maximum potential" standard); *Renner*, 185 F.3d at 645-46; *Roland M.*, 910 F.2d at 991-92 (child's IEP satisfied Massachusetts' "maximum possible development" standard); *Cothern*, 565 F.Supp. at 706-08 (child's IEP satisfied Missouri's "maximizes the capabilities" standard); *see also G.D.*, 930 F.2d at 950 (child's IEP satisfied New Hampshire's "equal educational opportunities standard").

[27] Clare McCann, *IDEA Funding*, New America EdCentral, http://www.edcentral.org/edcyclopedia/individuals-with-disabilities-education-act-funding-distribution (last visited April 11, 2016) (IDEA funding covered sixteen percent of the estimated excess cost of educating children with disabilities in fiscal year 2014).

APPENDIX

APPENDIX

20 U.S.C. § 1401(9)

(9) Free appropriate public education. The term "free appropriate public education" means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(26)

(26) Related services

(A) In general

The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such

medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

(B) Exception

The term does not include a medical device that is surgically implanted, or the replacement of such device.

20 U.S.C. § 1401(29)

(29) Special education. The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

20 U.S.C. § 1412(a)(1)(A)

(a) In general. A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

(1) Free appropriate public education

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

20 U.S.C. § 1414(d)

(d) Individualized education programs

(1) Definitions. In this chapter:

(A) Individualized education program

(i) In general. The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child's present levels of academic achievement and functional performance, including—

(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)

(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412(a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and

(VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter—

(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

(bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and

(cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title.

RECORD
AND
BRIEF

No. 15-827

IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

Brian Wolfman
Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Jack D. Robinson
Counsel of Record
SPIES, POWERS &
ROBINSON, P.C.
1660 Lincoln Street
Suite 2220
Denver, CO 80264
(303) 830-7090
robinson@sprlaw.net

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF FOR PETITIONER

The petition shows that the circuits are in disarray concerning an important question of federal law: what level of educational benefit school districts must confer on children with disabilities to provide them with a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA). Respondent offers three reasons why this Court should deny review: (1) the conflict is not as stark as the petition maintains; (2) resolving the conflict will not make a difference in determining whether school districts have provided a FAPE to children with disabilities; and (3) this Court resolved the merits almost thirty-five years ago in *Board of Education v. Rowley*, 458 U.S. 176 (1982).

None of these reasons is persuasive. This Court should grant review.

A. The Circuits Are In Disarray.

1. The petition explains that the circuits are intractably divided over what the IDEA means when it requires school districts to provide an "appropriate" level of education to children with disabilities. Two circuits – the Sixth and the Third – hold that a child's individualized education program (IEP) must be calculated to provide the child with a substantial educational benefit. Pet. 10-11. Five other circuits expressly reject that view and hold that this Court's decision in *Rowley* requires no more than a just-above-trivial educational benefit. *Id.* at 11-13. Three circuits also appear to apply the just-above-trivial standard but without expressly rejecting the higher standard. *Id.* at 13-14. And the Ninth Circuit is

internally conflicted, with different panels aligning with opposite sides of the circuit split. *Id.* at 14.

Respondent's primary response to this deep division among the courts of appeals is that some circuits that apply the just-above-trivial standard use different adjectives (generally, "some" and "meaningful") to describe the level of educational benefit that they think the IDEA requires. BIO 12-20. This argument is a non sequitur. As the petition acknowledges (at 17), some circuits in that camp have indeed used the term "meaningful benefit," and others have used "some benefit," *see id.* at 11-12, 13-14. But respondent does not disagree that all of these circuits, in fact, have adopted a just-above-trivial standard.[1]

---

[1] Consistent with the petition (at 12-13), respondent's discussion of the case law acknowledges that the First, Second, Fourth, and Tenth circuits require no more than a just-above-trivial benefit. *See* BIO 17 (quoting *D.B. v. Esposito*, 675 F.3d 26, 34-35 (1st Cir. 2012) ("more than a trivial educational benefit")), 19 (quoting *P. ex rel. Mr. and Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 119 (2d Cir. 2008) ("more than only 'trivial advancement'")), 20 n.18 (quoting *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015) ("more than minimal progress")), 19 (quoting Pet. App. 16a ("must merely be 'more than *de minimis*'") (Tenth Circuit's decision below)). Nor does respondent deny that the Fifth, Seventh, Eighth, and Eleventh circuits also apply a just-above-trivial standard. *See* Pet.13-14; *see also* BIO 20 (quoting *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997), and *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist.*, 375 F.3d 603, 615 (7th Cir. 2004), for the proposition that the IDEA requires that an IEP "likely . . . produce progress, not regression or trivial educational advancement.").

Nor does respondent disagree that panels in the Ninth Circuit have come to very different conclusions, with one panel adopting the heightened standard enunciated by the Third and Sixth Circuits, then another adopting a lower standard, and, most recently, still another "reviving" the higher standard on the ground that the IDEA's 1997 amendments demand it. BIO 23-25 & n.22; *see* Pet. 14 (explaining Ninth Circuit case law).

2. That leaves the Third and Sixth Circuits, which, as noted, require that school districts seek to provide children with disabilities a substantial educational benefit. *See* Pet. 10-11. Respondent does not deny that these two circuits have taken a different, more demanding approach. Instead, respondent suggests only that the Third and Sixth Circuits may not be genuinely committed to the higher standard. This suggestion is incorrect.

Third Circuit. Respondent acknowledges that the Third Circuit adopted a higher standard, BIO 21, but then claims that the Third Circuit "has not strayed far, or for long" from other circuits, *id.* at 22. That claim is wrong. The Third Circuit has consistently applied a higher standard, and rejected the just-above-trivial standard, beginning almost thirty years ago. *See, e.g., Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 178-85 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). That court squarely reiterated its view in *Ridgewood Board of Education v. N.E. ex rel. M.E.*, 172 F.3d 238, 247 (3d Cir. 1999). *See also T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 & n.2 (3d Cir. 2000) (Alito, J.) (embracing the *Polk* standard and explaining that

the district court erred as a matter of law in using the just-above-trivial standard).

Contrary to respondent's suggestion, the Third Circuit has not in recent years abandoned or softened its support for the higher standard, and respondent points to no Third Circuit decision that does so. Rather, the Third Circuit continues to emphatically embrace the higher standard and reject the just-above-trivial standard. *See L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 390 (3d Cir. 2006). And, even as respondent notes that various commentators differ over the exact configuration of the multi-circuit conflict, BIO 15-16 & nn.12-13 – hardly a way to demonstrate a lack of division among the circuits – it expressly acknowledges that all of these commentators place the Third Circuit on the heightened-benefit side of the divide. *See id.* at 16 & n.12.

Sixth Circuit. Respondent's attempt to explain away the Sixth Circuit's position is even weaker. Respondent does not deny that the Sixth Circuit has expressly rejected the just-above-trivial standard and adopted a higher standard – and followed the Third Circuit's precedents in doing so. *See Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 862-63 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005). Rather, respondent simply chastises the Sixth Circuit's analysis on its merits, claiming that *Deal*'s adoption of the higher standard was borne out of misunderstandings of this Court's decision in *Rowley* and the IDEA's legislative history. BIO 22-23. This argument, however, underscores, not mitigates, the need for review.

Respondent also claims that "the passage of time has worn the edges off of *Deal*," BIO 23, but it cites no Sixth Circuit decision even suggesting that that court has backed away from *Deal* – and there is none. Respondent says only that the 2006 decision in *Deal* has not been viewed as significant in other circuits, *see id.*, although even on that score respondent acknowledges *Deal*'s substantial impact on the confused state of affairs in the Ninth Circuit. *See id.* at 24 (citing *N.B. v. Hellgate Elementary Sch. Dist. ex rel. Bd. of Dirs.*, 541 F.3d 1202, 1213 (9th Cir. 2008)). In any case, *Deal*'s impact (or not) outside of the Sixth Circuit does not negate its secure position on one side of the circuit conflict.

* * *

One final point – ignored by respondent – underscores the existence, and persistence, of the circuit split. Five circuits have acknowledged, but rejected, the higher standard embraced by the Third and Sixth Circuits. *See* Pet. 12-13 (discussing the precedent in these five circuits). The Tenth Circuit below, for instance, adopted the "more than de minimis" standard, Pet. App. 16a-17a (citation omitted), and "explicitly rejected" the "Third Circuit's heightened 'meaningful benefit' standard." *Id.* at 19a; *see also, e.g.*, *Todd v. Duneland Sch. Corp.*, 299 F.3d 899, 905 n.3 (7th Cir. 2002) (expressly rejecting the "more stringent test" prevailing in the Third and Sixth Circuits).

This Court should resolve the acknowledged and longstanding conflict.

B. The Question Presented Is Important And Outcome Determinative.

Respondent argues that the question presented is unimportant because the varying standards in the circuits – and presumably any standard that this Court might adopt in interpreting the IDEA – would make little or no difference in the actual educational benefits received by students with disabilities. Before explaining why that argument is wrong, it is important to emphasize what respondent is *not* arguing and, thus, what it is tacitly conceding.

First, respondent does not dispute that if rejecting the just-above-trivial standard *could* affect outcomes in some cases, it would almost surely matter to Drew, because, as the Tenth Circuit recognized, his is "without question a close case." Pet. App. 23a. Second, respondent does not contest that this case – with its fully developed record and extended legal analysis below – is an excellent vehicle for resolving the question presented. *See* Pet. 19.

Instead, respondent appears to argue that review should be denied because, in its view, the question presented is not *generally* outcome determinative – that is, that the substantive standard for providing a FAPE, whatever it may be, almost never makes a difference in determining whether a child with a disability has received a FAPE. *See* BIO 10 (argument heading), 12-20, 27. Respondent claims that disputes over the appropriate standard are purely semantic – that, under the IDEA, standards such as "meaningful benefit," "some benefit," and "just above trivial" are generally unimportant, *id.* at 15-17, 19 – and that it is the facts of a given case, not

the FAPE standard, that matter, *id.* at 27. *See also id.* at 12 (the circuit conflicts are about "adjectives, not outcomes").

Respondent is incorrect. For starters, both petitioner and amici have demonstrated that the application of different FAPE standards do, in fact, alter the outcome in a range of IDEA cases. Pet. 17-18; Am. Br. of Autism Speaks, et al. 9-15 (describing the FAPE standards' "dramatic consequences" on case outcomes) (quoting heading). Respondent has not even attempted to dispute this showing. Nor has respondent answered the thousands of school boards, school administrators, and school attorneys who told this Court a decade ago that they needed an answer to the question presented because it would provide them "a uniform federal standard for determining whether states and school districts have met their obligations under the Act." Amicus Brief for Nat'l Sch. Bds. Ass'n et al., *Deal v. Hamilton Cty. Dep't. of Educ.* (No. 05-55), 2005 WL 2176860, at *1 (2005); *see also id.* at *11 (explaining that the FAPE standard "can make a concrete difference" in case outcomes).

More fundamentally, respondent's position defies common sense. That courts sometimes use different terms interchangeably or imprecisely is no reason to suggest, as does respondent, that "different adjectives" are never legally significant. BIO 12. "Probable" cause and "reasonable" suspicion may defy precise definition, or perfect implementation, but after judicial clarification and on-the-ground application, we know that the former demands significantly more than the latter. So, too, for instance, with varying formulations for standards of review or burdens of proof, which, this Court has

made clear, influence outcomes. *See, e.g., Pierce v. Underwood*, 487 U.S. 552, 565–68 (1998); *Santosky v. Kramer*, 455 U.S. 745, 758-66 (1982). And that some of the courts of appeals may unwittingly use "some benefit" and "meaningful benefit" to connote the same standard in construing the IDEA, *see* Pet. 17, is not a reason to deny review, but a reason to grant it, and to explain with clarity the standard that school districts must meet in seeking to provide students with a FAPE. Indeed, respondent's argument that state legislatures are the proper bodies "to impose a higher standard," BIO 27 (argument heading) – though misplaced because it is this Court's job to determine what the IDEA means – is an unstated concession that differing FAPE standards can matter to school districts, parents, and children with disabilities.

Finally, respondent claims that review should be denied because "[b]orderline cases will exist for as long as there are borders," and so "[c]hanging a border will not eliminate borderline cases." BIO 27. True, but irrelevant. The question presented is not about whether close cases exist or how to resolve them. The issue here concerns what the border is in the first place.

C. Respondent's Defense On The Merits Provides No Basis For Denying Review.

The petition maintains that the IDEA requires that an IEP be calculated to provide children with disabilities a substantial educational benefit and explains why the just-above-trivial standard embraced by the Tenth Circuit is at odds with the Act. Pet. 21-26. In general, respondent does not address these arguments, and so we will not rehash them here.

Respondent rest its merits defense on the simple conclusion that this Court resolved the question presented nearly thirty-five years ago in *Board of Education v. Rowley*, 458 U.S. 176 (1982). Respondent says that *Rowley* is now "settled law," BIO 10, which requires school districts to provide children with disabilities only minimal educational benefits, *id.* at 19. As discussed in the petition (at 4-5, 24-25), that understanding of *Rowley* is incorrect.

Rowley held only that children with disabilities are entitled to substantive legal protection and left open the question of what level of benefit is appropriate. It did not attempt "to establish any one test for determining the adequacy of educational benefits," 458 U.S. at 202, and "confine[d its] analysis to th[e] situation" before it, in which a child, who sought provision of a personal special-education assistant, was already "performing above average in the regular classrooms." *Id.* Thus, "[n]othing in *Rowley* precludes" a FAPE standard that exceeds the just-above-trivial standard adopted in some circuits. *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 863 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005).

In any event, for present purposes, respondent's singular focus on *Rowley* puts the cart before the horse. In light of the differing FAPE standards in the circuits, *Rowley*'s meaning, assuming it is ultimately relevant, must be viewed as an open question that can be resolved only by this Court. Put another way, if this Court grants review, there will be time enough to debate the merits, including whether an issue that currently divides the lower courts was really decided by the Court decades ago.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Brian Wolfman
Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Jack D. Robinson
Counsel of Record
SPIES, POWERS &
ROBINSON, P.C.
1660 Lincoln Street
Suite 2220
Denver, CO 80264
(303) 830-7090
robinson@sprlaw.net

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RECORD AND BRIEFS

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In the Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F., PETITIONER

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
VANITA GUPTA
Principal Deputy Assistant Attorney General
IRVING GORNSTEIN
Counselor to the Solicitor General
ROMAN MARTINEZ
Assistant to the Solicitor General
SHARON M. MCGOWAN
JENNIFER LEVIN EICHHORN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

JAMES COLE, JR.
General Counsel
FRANCISCO LOPEZ
ERIC MOLL
Attorneys
U.S. Department of Education
Washington, D.C. 20202

QUESTION PRESENTED

The Individuals with Disabilities Education Act provides federal funds to States that agree to make available a "free appropriate public education" (FAPE) to every eligible child with a disability. 20 U.S.C. 1401(9), 1412(a)(1)(A), 1414(d)(1)(A). The question presented is whether the "educational benefit" provided by a school district must be "merely * * * more than *de minimis*" in order to satisfy the FAPE requirement. Pet. App. 16a (citations and internal quotation marks omitted).

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DOUGLAS COUNTY SCHOOL DISTRICT RE-1

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

This case involves the core requirement of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, that States make available a "free appropriate public education" (FAPE) to eligible children with disabilities. 20 U.S.C. 1401(9), 1412(a)(1)(A), 1414(d)(1)(A). Petitioner sued respondent, alleging that respondent had failed to provide him with a FAPE. The state administrative law judge and the federal district court rejected that claim on the ground that petitioner had been able to obtain "some" benefit from his public education. Pet. App. 27a-28a,

51a, 72a, 85a. The court of appeals affirmed, holding that "the educational benefit mandated by IDEA must merely be more than *de minimis*" and that the benefit provided here satisfied that standard. Pet. App. 16a (citations and internal quotation marks omitted).

1. The IDEA (formerly known as the Education of the Handicapped Act) provides federal grants to States "to assist them to provide special education and related services to children with disabilities." 20 U.S.C. 1411(a)(1). The statute's stated purpose is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. 1400(d)(1)(A). The IDEA pursues that objective by requiring States receiving IDEA funds to provide a FAPE to every eligible child with a disability residing in the State. 20 U.S.C. 1412(a)(1)(A). This Court has described the FAPE requirement as embodying Congress's "ambitious objective" in promoting educational opportunities for such children. *School Comm. of Burlington* v. *Department of Educ.*, 471 U.S. 359, 368 (1985) (*Burlington*).

a. The IDEA defines FAPE to mean "special education and related services" that

> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;

> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under section 1414(d) of [Title 20 of the United States Code].

20 U.S.C. 1401(9).

This Court has explained that the "individualized education program" (IEP) referenced in Subsection (D) of the FAPE definition operates as the "centerpiece" of the IDEA's scheme for providing children with disabilities with a FAPE. *Honig* v. *Doe*, 484 U.S. 305, 311 (1988); see 20 U.S.C. 1401(9)(D). An IEP must comply with specific statutory requirements and establish a special education program to meet the "unique needs" of each child. *Ibid.*; 20 U.S.C. 1414(d)(1)(A); 34 C.F.R. 300.22, 300.34, 300.39, and 300.320. That program must be designed to allow the child to "advance appropriately toward attaining the annual goals [set forth in the IEP]," "to be involved in and make progress in the general education curriculum," "to participate in extracurricular and other nonacademic activities," and "to be educated and participate with other children with disabilities and nondisabled children in [various] activities." 20 U.S.C. 1414(d)(1)(A)(i)(IV). The IDEA generally contemplates that each child's education "will be provided where possible in regular public schools, * * * but the Act also provides for placement in private schools at public expense where this is not possible." *Burlington*, 471 U.S. at 369; see 20 U.S.C. 1412(a)(10)(B).

In *Board of Education of the Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176, 207 (1982), the Court held that an IEP must be "reasona-

bly calculated to enable the child to receive educational benefits." The Court elaborated that the education a child receives must confer "some educational benefit" and that the benefit must be sufficient to provide each child with "access" to education that is "meaningful." *Id.* at 192, 200. In light of the "infinite variations" in the capabilities of different children with different disabilities, however, the Court declined "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* at 202.

b. The IDEA requires school districts to work collaboratively with parents to formulate the IEP for each child with a disability.[1] But Congress anticipated that this process would not always produce a consensus, and it established procedures by which parents can seek administrative and judicial review of a school district's IDEA-related determinations. See 20 U.S.C. 1415(f)-(j); *Burlington*, 471 U.S. at 368-369.

Parents who are not satisfied with an IEP, or with other related matters, must first notify the school district of their complaint. See 20 U.S.C. 1415(b)(6) and (7). If the dispute cannot be resolved through established procedures, the parents may obtain "an impartial due process hearing" before a state or local educational agency. 20 U.S.C. 1415(f)(1)(A)-(B). The losing party may then seek judicial review of a final administrative decision in either state or federal district court. 20 U.S.C. 1415(i)(2)(A). The court receives the records of the administrative proceedings, and it may hear additional evidence before rendering

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[1] See *e.g.*, 20 U.S.C. 1400(d)(1)(B), 1414(b)(2)(A), (d)(1)(B)(i), (d)(3)(A)(ii), (d)(3)(D), (d)(4)(A)(ii)(III) and (e), 1415(b)(1), (b)(3)-(5) and (f)(3)(E)(ii)(II).

its decision. 20 U.S.C. 1415(i)(2)(C). In adjudicating the case, the court must give "due weight" to the result of the state administrative proceedings. *Rowley*, 458 U.S. at 206.

2. Petitioner Endrew F. is a child with attention deficit/hyperactivity disorder and autism. Pet. App. 3a. Petitioner's autism "affects his cognitive functioning, language and reading skills, and his social and adaptive abilities," including his ability to communicate his needs and emotions. *Ibid.*; see *id.* at 28a. As a child with autism, petitioner is eligible for protection under the IDEA. 20 U.S.C. 1401(3); Pet. 6; Br. in Opp. 1.

Petitioner attended public school in respondent Douglas County School District from preschool through fourth grade. Pet. App. 3a-4a. Pursuant to the IDEA, he received a special education program through an IEP for each school year. *Ibid.* In the spring of 2010—near the end of petitioner's fourth-grade year—petitioner's parents met with respondent to discuss petitioner's proposed IEP for the following year. *Ibid.*; Br. in Opp. 2. Petitioner's parents believed that petitioner's fourth-grade IEP had produced no meaningful educational progress, and they rejected respondent's proposed fifth-grade IEP on the grounds that it was largely unchanged from the previous IEP. Pet. App. 4a, 15a. In May 2010, petitioner's parents withdrew petitioner from the public school system and placed him in a private school specializing in educating children with autism. *Id.* at 4a; Br. in Opp. 2. Petitioner has been able to "mak[e] academic, social and behavioral progress" at his new school. Pet. App. 29a.

In 2012, petitioner filed a due-process IDEA complaint with the Colorado Department of Education. Pet. App. 59a. The complaint asserted that respondent had denied him a FAPE within the public school system. *Id.* at 4a, 60a. Petitioner sought reimbursement for his tuition at the private school, pursuant to 20 U.S.C. 1412(a)(10)(C)(ii). *Id.* at 4a; see *Burlington*, 471 U.S. at 369.

After receiving evidence and conducting a three-day hearing, a Colorado administrative law judge (ALJ) ruled in favor of respondent and denied petitioner's request for reimbursement. Pet. App. 59a-85a. Relying on *Rowley*, the ALJ stated that a school district need only develop and implement an IEP that provides a child "*some* educational benefit" in order to comply with the IDEA. *Id.* at 75a (emphasis added). That standard was satisfied, the ALJ concluded, because petitioner had "made some academic progress" while enrolled in respondent's public school system. *Id.* at 84a-85a.

3. Petitioner sued respondent under the IDEA in the United States District Court for the District of Colorado, raising the same basic claim that respondent had denied him a FAPE. Pet. App. 4a. The district court upheld the Colorado ALJ's ruling in respondent's favor. *Id.* at 28a.

Like the ALJ, the district court relied on *Rowley* in holding that the IDEA requires States only to provide "some educational benefit." Pet. App. 36a. Based on evidence that petitioner has made "at the least, minimal progress," *id.* at 49a, the court concluded that petitioner had received all that the Act requires. *Id.* at 51a.

4. The Tenth Circuit affirmed. Pet. App. 1a-26a. It stated that *Rowley* merely requires "some educational benefit." *Id.* at 16a. The court further explained that under its longstanding interpretation of *Rowley*, "the educational benefit mandated by IDEA must *merely be more than de minimis*." *Id.* at 16a (emphasis added; citations and internal quotation marks omitted) (citing circuit precedent).

The court of appeals expressly stated that its "merely * * * more than *de minimis*" standard directly conflicts with the approach taken by other circuits, including the Third and Sixth Circuits. Pet. App. 16a-17a (citations and internal quotation marks omitted). The court described those circuits as "hav[ing] adopted a higher standard"—requiring a "*meaningful* educational benefit"—that promises children "a higher measure of achievement." *Id.* at 17a (emphasis added; citations omitted).

The court of appeals then applied its standard and concluded that "there are sufficient indications of [petitioner's] past progress to find the IEP rejected by the parents substantively adequate under our prevailing standard." Pet. App. 23a. The court acknowledged, however, that "[t]his is without question a close case," and the court did not address whether respondent would prevail under the "higher standard" adopted by other circuits. *Id.* at 17a, 23a.[2]

DISCUSSION

This Court should grant certiorari and overturn the Tenth Circuit's erroneous holding that States must provide children with disabilities educational benefits that are "merely * * * more than *de minimis*" in

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[2] The court of appeals denied rehearing en banc. Pet. App. 86a.

order to comply with the IDEA. Pet. App. 16a (citations and internal quotation marks omitted). That interpretation of the IDEA—which is shared by at least five other courts of appeals—directly conflicts with the published decisions of the Third and Sixth Circuits, both of which have rejected the "more than *de minimis*" test in favor of a more robust standard. The Tenth Circuit's approach is not consistent with the text, structure, or purpose of the IDEA; it conflicts with important aspects of this Court's decision in *Board of Education of the Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176 (1982); and it has the effect of depriving children with disabilities of the benefits Congress has granted them by law. The question presented is important and recurring, and this case is an appropriate vehicle for this Court to resolve the conflict in the circuits on the scope of the FAPE requirement. The petition for a writ of certiorari should therefore be granted.

A. There Is An Entrenched And Acknowledged Circuit Conflict On The Question Presented

The central issue raised by the petition is the degree of educational benefit that States must provide to children with disabilities in order to satisfy the IDEA's FAPE requirement. In *Rowley*, this Court declined to establish a single test for such benefits, emphasizing the different capabilities of different children with different disabilities. 458 U.S. at 202. The Court nonetheless concluded that States are required to provide "some" educational benefits and that those benefits must be sufficient to provide each child with "meaningful" access to education. *Id.* at 192, 200.

The courts of appeals are intractably divided over what *Rowley*'s interpretation of the FAPE standard

requires. Whereas at least six circuits adopt some version of the "merely * * * more than *de minimis*" test that the Tenth Circuit applied here, two circuits apply a more robust standard that requires a greater degree of educational benefit. This Court should grant review to resolve the split of authority.

1. In this case, the Tenth Circuit rejected petitioner's IDEA claim based on its longstanding view that a FAPE requires States to provide "some" educational benefit that is "merely * * * more than *de minimis*." Pet. App. 16a (citations and internal quotation marks omitted). At least five other courts of appeals—including the Second, Fourth, Seventh, Eighth, and Eleventh Circuits—apply essentially the same standard.[3] In those circuits, a school district can satisfy the

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[3] See, *e.g.*, *Doe* v. *East Lyme Bd. of Educ.*, 790 F.3d 440, 450 (2d Cir. 2015) ("To be substantively adequate, an IEP * * * must be likely to produce progress that is more than trivial advancement.") (citation and internal quotation marks omitted), cert. denied, 136 S. Ct. 2022 (2016); *O.S.* v. *Fairfax Cnty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015) ("[A] school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial, from special instruction and services."); *M.B.* v. *Hamilton Se. Sch.*, 668 F.3d 851, 862 (7th Cir. 2011) (requiring IEP that is likely to produce educational progress, "not regression or trivial educational advancement") (citations and internal quotation marks omitted); *Todd* v. *Duneland School Corp.*, 299 F.3d 899, 906 n.3 (7th Cir. 2002) (approving district court's use of a "more than mere trivial educational benefit" test); *K.E.* v. *Independent Sch. Dist. No. 15*, 647 F.3d 795, 810 (8th Cir. 2011) (requiring "some educational benefit" and holding that standard was satisfied because child "enjoyed more than what we would consider slight or de minimis academic progress") (internal quotation marks omitted); *JSK* v. *Hendry Cnty. Sch. Bd.*, 941 F.2d 1563, 1572-1573 (11th Cir. 1991) (requiring merely "some" benefit

IDEA's FAPE requirement by providing educational benefits that are just barely more than trivial.[4]

The Third and Sixth Circuits have expressly rejected that approach in favor of a more robust FAPE standard. In *Ridgewood Board of Education* v. *N.E.*, 172 F.3d 238 (1999) (*Ridgewood*), the Third Circuit held that an IEP must provide "significant learning and meaningful benefit." *Id.* at 247 (internal quotation marks omitted). The court stressed that "the benefit must be gauged in relation to a child's potential." *Ibid.* (citation and internal quotation marks omitted). Most importantly, the court emphasized that "[t]he provision of merely more than a trivial educational benefit" is *not* enough to satisfy the FAPE standard. *Ibid.* (internal quotation marks omitted). In subsequent cases, the Third Circuit has reaffirmed *Ridgewood*'s analysis, including its rejection of the view that providing "merely more than a trivial educational benefit" satisfies the FAPE re-

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and indicating that "a trifle [of benefit] might not" satisfy that standard).

[4] The First and Fifth Circuits have likewise stated that a FAPE requires more than simply a "trivial" or "*de minimis*" benefit, while also noting that the benefit or access provided must be "meaningful." See, *e.g.*, *D.B.* v. *Esposito*, 675 F.3d 26, 34 (1st Cir. 2012); *Rockwall Indep. Sch. Dist.* v. *M.C.*, 816 F.3d 329, 338 (5th Cir. 2016). It is not clear, however, whether those circuits would hold that the provision of anything beyond a trivial benefit necessarily means that the education provided is "meaningful" and thus satisfies the FAPE standard. If so, the governing legal standard in those circuits approximates the standard applied by the Second, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits. Different panels of the Ninth Circuit have disagreed with one another over the correct legal standard. Compare *J.L.* v. *Mercer Island Sch. Dist.*, 592 F.3d 938, 951 n.10 (2010), with *N.B.* v. *Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1212-1213 (2008); see Pet. 14.

quirement. *T.R.* v. *Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (*Kingwood*) (Alito, J.); see *L.E.* v. *Ramsey Bd. of Educ.*, 435 F.3d 384, 390 (3d Cir. 2006) (*Ramsey*).

The Sixth Circuit adopted the Third Circuit's test in *Deal* v. *Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004), cert. denied, 546 U.S. 936 (2005). There, the Sixth Circuit agreed with the Third Circuit's "meaningful educational benefit" standard, and it also agreed with the Third Circuit that "a mere finding that an IEP had provided more than a trivial educational benefit [i]s insufficient." *Id.* at 862 (citation and internal quotation marks omitted). The Sixth Circuit further observed that (1) "[i]n evaluating whether an educational benefit is meaningful, logic dictates that the benefit must be gauged in relation to a child's potential," and (2) "courts should heed" Congress's desire "not to set unduly low expectations for disabled children." *Id.* at 864 (citation and internal quotation marks omitted).

Notably, several courts of appeals adopting the less demanding "more than trivial" or "more than *de minimis*" standard have acknowledged the inter-circuit disagreement over the proper interpretation of the IDEA's FAPE requirement.[5] Indeed, the Tenth Circuit in this case expressly conceded that the Third and Sixth Circuits' "meaningful educational benefit" test reflected a "higher standard" that "promis[es] disa-

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[5] See, *e.g.*, Pet. App. 16a-18a (asserting split between Tenth Circuit, on the one hand, and Third, Fifth, and Sixth Circuits, on the other); *O.S.*, 804 F.3d at 359-360 (noting different standards applied by First, Fourth, Ninth, and Tenth Circuits); *Todd*, 299 F.3d at 905 n.3 (noting split between Third and Seventh Circuits).

bled children a higher measure of achievement" than its own test. Pet. App. 17a.

2. Respondent's efforts (Br. in Opp. 10-25) to minimize or deny the split are not persuasive.

First, respondent correctly points out (Br. in Opp. 10-12) that every circuit adheres to this Court's broad statement in *Rowley* that an IEP must be "reasonably calculated to enable the child to receive educational benefits." 458 U.S. at 207. But the agreement on that general point does not change the fact that the courts of appeals are intractably divided over whether that standard is satisfied when the educational benefits provided are barely more than *de minimis*. As discussed above, while many courts of appeals interpret *Rowley* to embrace the barely more than *de minimis* standard, the Third and Sixth Circuits expressly reject that interpretation of *Rowley* and understand the IDEA to require more.

Respondent also errs in contending (Br. in Opp. 12) that the circuit split is over "adjectives" that do not reflect "different standards." It is true that some courts of appeals have used the terms "some" and "meaningful" interchangeably. But the relevant conflict is not between courts that use the term "some" and those that use the term "meaningful." It is between the courts that hold that the IDEA requires the benefit to be merely more than "trivial" or "*de minimis*," and the courts that unambiguously reject that test in favor of a more robust standard. *Ibid.* That is a difference in legal standards, not adjectives.

When it comes down to it, respondent all but concedes the conflict. Respondent acknowledges (Br. in Opp. 19-20) that some courts, including the Tenth Circuit, embrace the merely more than *de minimis*

standard. Respondent also acknowledges (*id.* at 21-22) that Third and Sixth Circuit decisions have affirmatively rejected that standard as insufficient to satisfy the FAPE requirement. Respondent does appear to imply (*ibid.*) that the Third Circuit in *Ramsey* retreated from its decisions in *Ridgewood* and *Kingwood*. And respondent also says (*id.* at 23) that "time has worn the edges off [the Sixth Circuit's decision in] *Deal*." But *Ramsey* expressly reaffirmed that "the provision of merely more than a trivial education benefit" does not meet the requirements of the IDEA. 435 F.3d at 390 (citations and internal quotation marks deleted). And respondent cites no Sixth Circuit case departing from *Deal*'s equally emphatic rejection of the barely more than *de minimis* standard.

In short, the split of authority on the question presented is real, and only this Court can resolve it. There is no justification for providing children with disabilities different degrees of protection under federal law depending on where they happen to live. This Court should clarify the proper FAPE analysis and establish a uniform standard to guide courts, state educational agencies, and parents across the country.

B. The Tenth Circuit's "Merely * * * More Than *De Minimis*" Standard Is Erroneous

The Tenth Circuit's view that a State can satisfy the IDEA's FAPE requirement by providing children with disabilities educational benefits that are "merely * * * more than *de minimis*" is mistaken. Pet. App. 16a (citations and internal quotation marks omitted). That interpretation is not consistent with the IDEA's text or structure, with this Court's analysis in *Rowley*, or with Congress's stated purposes. This Court should hold that States must provide children with

disabilities educational benefits that are meaningful in light of the child's potential and the IDEA's stated purposes. Merely aiming for non-trivial progress is not sufficient.

1. The Tenth Circuit's standard does not square with the IDEA's requirement that the education provided be "appropriate." See 20 U.S.C. 1412(a)(1)(A) (requiring States to provide a "free *appropriate* public education") (emphasis added); see also 20 U.S.C. 1401(9)(C) (defining FAPE to require "an *appropriate* preschool, elementary school, or secondary school education in the State involved"). Standard dictionaries define "appropriate" to mean "specially suitable," "fit," or "proper," *Webster's Third New International Dictionary* 106 (1993) (capitalization omitted), or "suitable or proper in the circumstances," *The New Oxford American Dictionary* 76 (2d ed. 2005).

The "merely * * * more than *de minimis*" test is not compatible with the ordinary meaning of "appropriate." No parent or educator in America would say that a child has received an "appropriate" or a "specially suitable" or "proper" education "in the circumstances" when all the child has received are benefits that are barely more than trivial. That is particularly true when a child is capable of achieving much more.

Taken to its logical conclusion, the "merely * * * more than *de minimis*" test could lead to results that Congress plainly did not intend when it required an "appropriate" education. Consider a child whose hearing is impaired and requires assistive technology (such as an amplification device) in order to understand her teachers' instruction. See 20 U.S.C. 1414(d)(3)(B)(iv) and (v). If the school provides the device in the child's social studies class—but refuses

to do so for her math, reading, and science classes—the child may well make progress on her IEP goals in social studies, even while attaining no educational benefit whatsoever in any other subject. It would be absurd to describe the child's overall education as being "appropriate" for that child. Yet, under a literal understanding of the "merely * * * more than *de minimis*" test, the child would have received just that.

2. The structure of the IDEA likewise undermines the Tenth Circuit's approach. Most importantly, 20 U.S.C. 1414(d) makes clear that the IEP must be carefully tailored to the particular needs and abilities of each child, see 20 U.S.C. 1414(d)(1)(A)(i)(I), and it requires a clear statement of "measurable annual goals" in light of those needs and abilities, 20 U.S.C. 1414(d)(1)(A)(i)(II). Section 1414(d) also requires special education and related services to enable each child "to advance appropriately toward attaining the annual goals." 20 U.S.C. 1414(d)(1)(A)(i)(IV).

Section 1414(d)'s description of the IEP's requirements cannot be reconciled with the Tenth Circuit's "merely * * * more than *de minimis*" standard. Congress would not have instructed States to develop each child's IEP with such a clear focus on promoting measureable annual progress—gauged in light of the particular needs and capabilities of each child—if at the end of the day all it wanted to require was that States provide some degree of educational benefit that is barely more than trivial. The IDEA's IEP provisions provide reliable insight into what level of education Congress would have deemed "appropriate" for purposes of the FAPE requirement.[6] Indeed, Con-

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[6] See generally, *e.g.*, *Sossamon* v. *Texas*, 563 U.S. 277, 286 (2011) (looking to statutory context to determine what relief is "appropri-

gress expressly requires a FAPE to be "provided in conformity with the [IEP] required under [S]ection 1414(d)." 20 U.S.C. 1401(9)(D).

3. The Tenth Circuit's "merely * * * more than *de minimis*" standard also conflicts with the Court's analysis in *Rowley*. *Rowley* makes clear that States must provide children with "some" benefits so that access to education is actually "meaningful." 458 U.S. 192, 200. In isolation, "some" benefits could conceivably mean benefits that are anything more than nothing or its legal equivalent of *de minimis*. But the term "meaningful access" cannot bear that meaning. See, *e.g.*, *Merriam-Webster's Collegiate Dictionary* 769 (11th ed. 2005) (defining "meaningful" as "significant"); *The New Oxford American Dictionary* 1052 ("having a serious, important, or useful quality or purpose"). Thus, when *Rowley* indicated that that "some" benefits must be provided to ensure "access" to education that is "meaningful," it could not have meant that the benefits could be barely more than *de minimis*. 458 U.S. 192, 200. Only "meaningful" or "significant" benefits can afford such "meaningful" access.

The Tenth Circuit's test also contradicts *Rowley*'s emphasis on the "dramatically" different capabilities of different children with different disabilities. 458 U.S. at 202. *Rowley* cited those different capabilities

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ate" under 42 U.S.C. 2000cc-2(a); *West* v. *Gibson*, 527 U.S. 212, 217-218 (1999) (holding that meaning of term "appropriate" depends on statutory context); see also *Michigan* v. *EPA*, 135 S. Ct. 2699, 2707 (2015) (explaining that "appropriate" is "the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors") (citation and quotation marks omitted).

in explaining why it was declining "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Ibid.* The Tenth Circuit's test focuses only on whether the child has attained some degree of non-trivial benefit, and it does not require any consideration of how that benefit compares to the child's capabilities and potential. In doing so, the test departs from the child-specific analysis envisioned by *Rowley*.

4. Finally, in deciding what constitutes an "appropriate" education, Congress's stated purposes must be taken into account. See *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 239-245 (2009) (emphasizing that IDEA must be interpreted in light of its "remedial purpose"); see also *School Comm. of Burlington* v. *Department of Educ.*, 471 U.S. 359, 369 (1985) (holding that what constitutes "appropriate" relief in IDEA district court action must be determined "in light of the purpose of the [IDEA]"). The "merely * * * more than *de minimis*" standard undermines Congress's purposes.

Congress expressly stated that the IDEA's "purposes" include "ensur[ing] the effectiveness of[] efforts to educate children with disabilities" and providing such children with a FAPE that would "meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. 1400(d)(1)(A) and (4). It further explained that the IDEA was targeted to "[i]mproving educational results for children with disabilities" and thereby helping to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency" for such individuals. 20 U.S.C. 1400(c)(1). Congress also emphasized the importance of setting

"high expectations"—and avoiding "low expectations"—for children with disabilities. 20 U.S.C. 1400(c)(4) and (5). These robust statements of congressional intent are not consistent with the Tenth Circuit's minimalist interpretation of the FAPE requirement.

Indeed, if school districts provide benefits that are barely more than *de minimis*, it would make the accomplishment of Congress's stated purposes nearly impossible. No reasonable school district sets out to provide educational benefits to its non-disabled children that are barely more than trivial. Providing children with disabilities such limited benefits would therefore deprive them of any semblance of "equality of opportunity." 20 U.S.C. 1400(c)(1). If all that is provided are just above *de minimis* benefits, it is hard to imagine that disabled children will be prepared for "further education, employment, and independent living." 20 U.S.C. 1400(d)(1)(A). And rather than promote "higher expectations," the barely more than *de minimis* standard expressly *lowers* expectations.

That does not mean the IDEA requires States to "maximize each child's potential," *Rowley*, 458 U.S. at 198. Nor does it mean that States must "achieve strict equality of opportunity or services." *Ibid.* But given Congress's stated purposes, States must do more than provide merely more than *de minimis* benefits.

4. For the reasons noted above, this Court should reject the Tenth Circuit's "merely * * * more than *de minimis*" interpretation of the FAPE requirement. Instead, the Court should make clear that the IDEA—as interpreted by *Rowley*—ultimately requires States to provide children with disabilities access to educational benefits that are meaningful in light of the

child's potential and the purposes of the Act. See 20 U.S.C. 1412(a)(1)(A); *Rowley*, 458 U.S. at 192. In applying that standard, courts must grant "due weight" to the child-specific decisions made by State educational agencies and educators. *Rowley*, 458 U.S. at 206; see also *id.* at 207 ("[C]ourts must be careful to avoid imposing their view of preferable educational methods upon the States.").

C. The Question Presented Is Important And Recurring, And The Court Should Resolve It In This Case

The degree of educational benefit contemplated by the IDEA's FAPE requirement presents a fundamental question of federal education law. This Court has explained that the FAPE requirement is the statutory mandate "most fundamental" to the IDEA and that "[t]he adequacy of the [child's] educational program is, after all, the central issue" in IDEA litigation. *Winkelman* v. *Parma City Sch. Dist.*, 550 U.S. 516, 530, 532 (2007); see 20 U.S.C. 1415(f)(3)(E). How a school district must satisfy its obligation to provide a FAPE frequently arises, both in litigation (as the circuit conflict described above establishes) and in everyday decisions made by educators and parents in developing IEPs for children with disabilities.

The question whether the IDEA requires benefits that are barely more than *de minimis* or instead imposes a more robust standard is also one of great practical significance. If school districts are told that a FAPE requires merely that they provide children with disabilities with educational benefits that are "more than trivial" or "more than *de minimis*"—*i.e.*, if they are told that it is perfectly fine to aim low—they are less likely to offer the same educational opportunities than if they are told that children with disabilities

must receive "meaningful" benefits in light of each child's potential and the IDEA's stated goals. As a practical matter, the choice of legal standard is likely to shape the conduct and choices of educators and parents when developing IEPs for children with disabilities.

The choice of standard can also be outcome-determinative when a school district's decision is subject to judicial review. The Third Circuit's decision in *Ridgewood*, *supra*, provides an example. There, the court of appeals overturned the district court's decision in favor of the school district because the lower court had applied the erroneous "more than a trivial educational benefit" standard. *Ridgewood*, 172 F.3d at 243 (vacating and remanding the district court's decision on that basis).

The Tenth Circuit's decision in this case further illustrates that the choice of standard can make a difference. Here, the court of appeals emphasized that "[t]his is without question a close case" under its less-demanding "merely * * * more than *de minimis*" test. Pet. App. 16a, 23a (citations and internal quotation marks omitted). The Tenth Circuit's acknowledgment of the closeness of the case offers good reason to believe that the outcome may well have been different under the "higher standard" that the court acknowledged is applied by other circuits. *Id.* at 17a. The same will undoubtedly be true in other cases.

Finally, if petitioner and the government are correct, students across the country are being denied the "meaningful" educational benefits to which they are entitled by law. This Court should grant review to decide the proper legal standard for determining the required level of benefit States must provide and vin-

dicate Congress's sustained effort to promote opportunities for children with disabilities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
VANITA GUPTA
Principal Deputy Assistant Attorney General
IRVING GORNSTEIN
Counselor to the Solicitor General
ROMAN MARTINEZ
Assistant to the Solicitor General
SHARON M. MCGOWAN
JENNIFER LEVIN EICHHORN
Attorneys

JAMES COLE, JR.
General Counsel
FRANCISCO LOPEZ
ERIC MOLL
Attorneys
U.S. Department of Education

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RECORD
AND
BRIEFS

Case No.: 15-827

In The Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. and JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

AMICI CURIAE BRIEF OF AUTISM SPEAKS AND THE PUBLIC INTEREST LAW CENTER IN SUPPORT OF PETITIONER

DANIEL R. UNUMB
AUTISM SPEAKS LEGAL RESOURCE CENTER
863 Corley Mill Road
Lexington, SC 29072
(803) 520-8080
daniel.unumb@autismspeaks.org

GREGORY J. WALLANCE
Counsel of Record
W. STEWART WALLACE
KAYE SCHOLER LLP
250 West 55th Street
New York, New York 10019
(212) 836-8000
gregory.wallance@kayescholer.com

(See inside cover for additional appearance)

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JENNIFER R. CLARKE
PUBLIC INTEREST LAW CENTER
1709 Benjamin Franklin
Parkway
Philadelphia, PA 19103
(215) 627-7100
jclarke@pilcop.org

Counsel for Amici Curiae

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INTEREST OF THE AMICI CURIAE[1]

Amicus Curiae Autism Speaks is the world's leading autism science and advocacy organization dedicated to increasing awareness and education about autism, funding research into the causes, prevention, treatments and cures, enforcing state and federal rights and protections for individuals with autism and advocating for the needs of individuals with autism and their families. Autism Speaks is deeply familiar with the special education challenges faced by children with autism and their families, and the special teaching approaches proven effective to enable children with autism to learn and to generalize skills across a variety of settings and have the opportunity to lead functional, independent lives.

Amicus Curiae The Public Interest Law Center is a not-for-profit public interest law firm that has successfully advanced the rights of children with disabilities to a quality public education since its founding in 1969. The Law Center's seminal lawsuit, *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania*, established the rights of children

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[1] Pursuant to Supreme Court Rule 37.6, no party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief. Counsel of record for all parties received notice of *Amici Curiae*'s intention to file this brief more than 10 days before it was due. The parties have consented to the filing of this brief in letters on file with the Clerk's office.

with disabilities to a public education and led to the federal Education for All Handicapped Children Act, the precursor to the Individuals with Disabilities Education Act ("IDEA"). Since then the Law Center has represented clients in hundreds of other important IDEA cases throughout the country, including cases on behalf of children with autism.

This case concerns the IDEA, 20 U.S.C. § 1400 et seq., which provides special education services to approximately 6.4 million school-aged children with disabilities in the United States. *Amici* have a strong interest in having this Court resolve the split in the courts of appeals over the proper educational standard for children with disabilities under the IDEA. *Amici* are concerned that the just-above-trivial educational standard adopted by the Tenth Circuit below, and by other courts of appeals, is not reasonably calculated to meet the educational needs of children with disabilities, and therefore impairs their access to an education and opportunity for independence and self-sufficiency.

SUMMARY OF ARGUMENT

The IDEA requires public schools to provide children with disabilities a "free appropriate public education" ("FAPE"). Instrumental to achieving the IDEA's goal is an "individualized education program" ("IEP"). An IEP is an educational blueprint for each child with disabilities which

includes, *inter alia*, a statement of measurable annual goals and how the child's progress towards those goals will be assessed.

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), this Court held that each IEP must be reasonably calculated to confer an educational benefit, but expressly declined to define the appropriate level of educational benefit. Since *Rowley*, the courts of appeals have become badly divided over this issue. Some circuits require a substantial educational benefit (often described as a "meaningful" one) while others (including the Tenth Circuit) require only a just-above-trivial educational benefit. Cert. Pet. at 9-14. For several reasons, review is necessary to resolve the conflict over an issue of paramount importance to children with disabilities, their parents, and their school districts.

First, it is axiomatic that the standard for educational benefits under the IDEA for a child with disabilities should not depend on which federal appellate jurisdiction his school district happens to be located in. Nonetheless, cases indicate that children with autism and other disabilities in jurisdictions that have adopted the just-above-trivial standard have demonstrably worse educational prospects than children in jurisdictions that have adopted the substantial benefit standard. For example, as compared with courts in the substantial benefit jurisdictions, courts in the just-above-trivial jurisdictions are less

receptive to the arguments of parents of a child with autism that the child's IEP should include proven evidence-based interventions such as Applied Behavior Analysis ("ABA"), which has been shown to be effective in improving the learning ability of children with autism.

Second, a uniform national standard for a FAPE will allow for better predictability of litigation outcomes by school districts and parents and thus lead to earlier resolutions of disputes over IEPs. This will reduce the time and money spent on litigation by school districts that could better be spent on special education and allow parents to devote more of their hard-pressed emotional and financial resources to the support of their children with disabilities. A uniform standard will also avoid the current unseemly educational disparity that children in just-above-trivial jurisdictions receive less educational access under the IDEA than children with comparable disabilities in substantial benefit jurisdictions.

Third, the need to resolve the circuit split is especially pressing because of the rapidly expanding scope and nature of disabilities presented by children served under the IDEA. The enrollment in the IDEA of children with autism disorders, for example, has increased twenty-five fold since 1992. And, developments in evidence-based interventions and assistive technologies since *Rowley* can substantially enlarge the access of children with disabilities to a meaningful

education fostering independent, productive lives consistent with society's evolved notions of the rights and capabilities of children with disabilities. Children in circuits that allow IEPs to be calculated to achieve a just-above-trivial standard may not realize the full benefit of these tools. Far from serving as a floor of opportunity, this standard erects a ceiling on their future at tremendous cost to themselves and society.

Finally, resolution of the circuit split is necessary to give meaning to the IDEA amendments enacted since *Rowley* was decided thirty-four years ago. The amendments support the substantial benefit standard rejected by the Tenth Circuit. Among other changes to the IDEA, Congress recognized the need to have high expectations for children with disabilities and the importance of assistive technology. Congress emphasized that IEPs should prepare children with disabilities for further education, employment and independent living, ambitious objectives that were not present in the IDEA when first enacted in 1975. Review is necessary because the just-above-trivial standard is incompatible with those goals.

ARGUMENT

I. The Level of Substantive Educational Benefit Under the IDEA Profoundly Affects Access to Education for Many Children With Disabilities

A. The Tenth Circuit's Adoption of the Just-Above-Trivial Standard Permitted a School District to Leave Unaddressed the Severely Dysfunctional Classroom Behavior of a Child With Autism

This case and others cited below illustrate how the education of a child with disabilities can be dramatically affected by the level of educational benefit sought to be achieved by the child's IEP.

Petitioner Endrew F. ("Drew") was diagnosed with autism at age two. Pet. App. 3a. Autism is a complex and pervasive neuro-developmental disorder.[2] In general, its characteristics are impaired social interactions and communication and "repetitive activities . . ., resistance to environmental change or change in daily routines, and unusual responses to sensory experiences." 2004 IDEA

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[2] Autism is one condition in a spectrum of other pervasive developmental disorders, collectively called Autism Spectrum Disorder, or ASD. The fifth edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* adopts this diagnostic terminology, which is used by this brief. *See* Am. Psychiatric Ass'n, *Autism Spectrum Disorder* (2013), http://www.dsm5.org/Documents/Autism%20Spectrum%20Disorder%20Fact%20Sheet.pdf.

Regulations, codified at 34 C.F.R. § 300.8(c)(1)(i). In its more severe forms, individuals with autism may exhibit aggressive or self-injurious behaviors. Connie Anderson, *New Research on Children with ASD and Aggression*, Kennedy Krieger Inst. (2011).[3]

Drew's autism posed significant challenges. It affected his "cognitive functioning, language and reading skills, and his social and adaptive abilities." Pet. App. 3a. Drew attended Douglas County, Colorado schools from preschool through the fourth grade, during which he received special education services. *Id.* 3a-4a. After what the Tenth Circuit termed an "especially rocky fourth-grade year" – Drew "hit things, screamed, ran away from school, and twice removed his clothing and [went] to the bathroom on the floor of the classroom" – Drew's parents withdrew him from the school and placed him in a private school that specialized in educating children with autism. *Id.* 4a, 12a.

Drew's special education in the Douglas County schools differed significantly from the private school because the latter provided Drew with ABA, an evidence based intervention that the most authoritative voices in American pediatrics have found effective for children with autism.[4] *See infra*

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[3] Available at http://www.iancommunity.org/cs/simons_simplex_community/aggression_and_asd.

[4] ABA is "the process of systematically applying interventions based upon the principles of learning theory to improve socially significant behaviors to a meaningful degree, and to

Part III. Indeed, the private school's annual education report for Drew noted his remarkable behavioral progress under ABA and recommended: "[c]ontinued one-to-one support from staff members certified in the use of ABA techniques for managing behavior. *Drew has made great behavioral gains over the past school year* and so his current school support team should continue with supports they have in place." Tenth Circuit Joint Appendix ("CA10 Jt. App.") Vol. IV p. 198 (emphasis added). For example, according to his senior teacher, he made a "huge jump" in "not engag[ing] in target behaviors," in "us[ing] the bathroom," and in overcoming phobias so that "he doesn't scream or run in the other direction." *Id.* Vol. II pp. 133-35. Most critically, Drew was able to "attune to what's being done" in the classroom, "increase his math skills," "complete verbal word problems that are functional," and "interact with his teachers and peers." *Id.* pp. 132-33.

Nonetheless, applying the just-above-trivial standard, the Tenth Circuit rejected the parents' argument that the school district had failed to address Drew's educationally debilitating but clearly remediable behaviors and rejected their request for reimbursement of the private school tuition under 20 U.S.C. § 1412(10)(C)(ii) (providing for reimbursement of private school costs when the school district fails to

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demonstrate that the interventions employed are responsible for the improvement in behavior." Center for Autism and Related Disorders, http://www.centerforautism.com/aba-therapy.aspx.

make a FAPE available in a timely manner). Pet. App. 23a-26a. At the same time, the Tenth Circuit candidly acknowledged that even under the lesser standard this was a "close case." *Id.* 23a. Thus, had the Tenth Circuit applied the substantial benefit standard, Drew's IEP, without ABA, likely would have been found insufficient to afford Drew access to a FAPE.[5]

B. The Level of Substantive Educational Benefit Can Have Dramatic Consequences for the Ability of Children With Disabilities to Access an Education

In a disturbing pattern, other courts in jurisdictions using the just-above-trivial standard have found that children with autism received a FAPE based on low or even ambiguous goals that excluded evidence-based interventions such as ABA. *See, e.g., Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1032 (8th Cir. 2000) (finding that

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[5] In the Douglas County schools, Drew moved up to subsequent grades each year, but the objectives, measuring criteria, and annual goals contained within each subsequent IEP demonstrate that this "progress" was, at best, just-above-trivial. For example, Drew's IEP for the 2007-08 school year provides for several short-term objectives such as "Drew will make eye contact with peers and teachers with minimal prompting" and "Drew will learn his classmates' names." CA10 Jt. App. Vol. III pp. 147, 158. The following year, Drew "graduated" to the third grade, yet the same short-term objectives remained in his IEP for the 2008-09 school year, underscoring his lack of meaningful progress. *Id.* p. 202. Finally, although dropped from the 2009-10 IEP, Drew's 2010-11 IEP again provided that "Drew will demonstrate knowledge of peers' names . . . ." *Id.* p. 272.

district's IEP for a kindergarten child with autism met the just-above-trivial standard, rather than parents' requested Lovaas (ABA) program under which the student's "verbal skills improved");[6] *Z.F. v. South Harrison Cmty. Sch. Dist.*, No. 404CV0073DFHWGH, 2005 WL 2373729, *8, **10-11 (S.D. Ind. Sept. 1, 2005) (applying the just-above-trivial standard to uphold portion of an IEP that failed to list any academic goals and that would "eliminate the district's support for [the child's] at-home ABA instruction, [and] sharply curtail [his] access to ABA teaching methods in the classroom setting" despite the ABA instruction having been "appropriate and effective."); *see also, K.S. ex rel. P.S. v. Fremont Unified Sch. Dist.*, 679 F. Supp. 2d 1046, 1054 (N.D. Cal. 2009) (under just-above-trivial standard, upholding admin-

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[6] "Lovaas" refers to the ABA intervention program developed at UCLA under the direction of Dr. O. Ivar Lovaas. http://www.lovaas.com. In 1987, Dr. Lovaas published a landmark research study showing 90% of subject children with autism substantially improved when utilizing ABA, compared to the control group, and close to half attained a normal IQ and tested within the normal range on adaptive and social skills. Ole Ivar Lovaas, *Behavioral treatment and normal educational and intellectual functioning in young autistic children*, 55 J. CONSULTING & CLINICAL PSYCHOLOGY 1, 6 (1987). A 1993 study showed that these same children had maintained their skills into early adolescence and could succeed in life without costly special education and residential services. John Jay McEachin, et al., *Long-term outcome for children with autism who received early intensive behavioral treatment*, 97 AM. J. MENTAL RETARDATION 4, 359-372 (1993).

istrative law judge's determination that child making slow and incomplete progress on district's IEP goals was not capable of making any further progress, and thus had received a FAPE, despite expert testimony that ABA intervention would allow for "a better potential for progress").

By contrast, in jurisdictions that apply a substantial benefit standard, a student with autism has materially better prospects for receiving interventions that can be vital to his access to an education. *See, e.g., New Milford Bd. of Educ. v. C.R.*, 431 Fed. Appx. 157, 160 (3d Cir. 2011) (holding that the district's IEP did not meet the substantial benefit standard due to its failure to provide an after-school ABA program for a student with autism whose "behaviors were not only detrimental to his home life, but also interfered with his learning"); *Blake C. ex rel. Tina F. v. Dep't of Educ., Haw.*, 593 F. Supp. 2d 1199, 1207-13 (D. Haw. 2009) (reversing hearing officer's finding that the district's IEP, under which the student made minimal progress, satisfied the just-above-trivial standard, and instead finding that under the substantial benefit standard, the parents were entitled to reimbursement for private placement at Pacific Autism Center, a school dedicated to research-based services using ABA for special needs children with autism);[7] *Woods v. Northport Pub. Sch.*, 487 Fed. Appx. 968, 975, 978 (6th Cir. 2012) (holding that district's IEP did not

[7] *See* https://www.autismspeaks.org/resource/pacific-autism-center.

meet the meaningful benefit standard because, although the student with autism made "some progress during his second-grade year[,]" it was not "*meaningful* in light of [his] potential," and ordered 768 hours of one-to-one compensatory education with a tutor qualified to teach children with autism) (emphasis in original); *see also, T.H. v. Bd. of Educ. of Palatin Cmty. Consol. Sch. Dist. 15*, 55 F. Supp. 2d 830, 843 (N.D. Ill. 1999) (before Seventh Circuit adopted lesser standard, court held under the substantial benefit standard that school's IEP did not provide opportunity for a "meaningful access to education" and ordered reimbursement of parent's 38-hour ABA/DTT program).[8]

This disparity in educational access, however, is not limited to children with autism. Children with a wide range of disabilities continue to fall further behind their peers as a result of the just-above-trivial benefit standard, which lowers the school district's obligation to, and expectations for, such children. *See, e.g., K.E. ex rel. K.E. v. Independent School Dist. No. 15*, 647 F.3d 795, 810 (8th Cir. 2011) (upholding under just-above-trivial standard the district court's finding that the IEP for a child with bipolar disorder and fetal alcohol syndrome was sufficient despite acknowledging

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[8] DTT, or discrete trial training, is a style of ABA teaching that "uses a series of trials to teach each step of a desired behavior or response." Centers for Disease Control and Prevention ("CDC"), *Autism Spectrum Disorder (ASD) Treatment*, http://www.cdc.gov/ncbddd/autism/treatment.html

that her test results "do not demonstrate the level of growth that is typical for children of her grade level"; dissent, applying the "meaningful benefit" standard, would have reversed because child's academic progress in the relevant period was "trivial"); *J.L. v. Mercer Island Sch. Dist.*, No. C06-494MJP, 2010 WL 3947373, at *1, *8 (W.D. Wash. Oct. 6, 2010) (on remand from Ninth Circuit to apply the just-above-trivial standard, district court upheld IEP for child with learning disabilities even though the district court had previously rejected it under the substantial benefit standard because the IEP had remained "essentially unchanged" from the year before, under it the student continued to "fall[] further behind her classmates,"[9] and by contrast now was making "remarkable progress" at private placement).

In comparison, under the substantial benefit standard, school districts have higher expectations and accordingly provide more support for children with various disabilities. *See, e.g., Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 247 (3d Cir. 1999) (employing substantial benefit standard to reverse district court decision that had used the just-above-trivial standard to uphold school's IEP for a child with a learning disability in reading and writing; upon remand to apply the higher standard, the district court concluded that the school district

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[9] *J.L. v. Mercer Island Sch. Dist.*, No. C06-494P, 2006 WL 3628033, at *1 (W.D. Wash. Dec. 8, 2006).

was not providing a FAPE);[10] *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 172, 184-85 (3d. Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989) (holding that although the district's consultative physical therapy to "a child with severe mental and physical impairments" conferred some benefit in that less regression might occur, under the heightened substantial benefit standard, such benefit may not be sufficient, especially in light of the child's dramatic improvement under direct physical therapy); *Day v. Radnor Tp. Sch. Dist.*, Civ. A. No. 92-3764, 1993 WL 34761 at *1, *3 (E.D. Penn. Feb. 8, 1993) *and* 1993 WL 95506 at *2 (Mar. 31, 1993) (stating that, although the parties did not dispute that a "severely retarded and multiply handicapped" child would make some progress at day school, under the substantial benefit standard the child was entitled to attend a residential school where she had made "significant progress").

The pattern in these cases indicates that the conflict among the courts of appeals over the substantive level of educational benefit has added a factor – the federal appellate jurisdiction where the child goes to school – that should have no place in

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[10] Lester Aron, Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Education After Rowley?, 39 SUFFOLK U. L. REV. 1, 9, n.61 (2005) (citing unpublished decision: *Ridgewood Bd. of Educ. v. N.E. ex rel M.E.*, No. 97-02039 (D.N.J. Apr. 17, 2000)).

evaluating and meeting the needs of children with disabilities under the IDEA.[11]

II. Children With Disabilities, Their Parents and School Districts Will Benefit From a Clearly Defined Level of Educational Benefit Under the IDEA

The resolution of the appropriate standard for a FAPE is important to countless numbers of children with disabilities, their parents, and their educators. A uniform national standard will afford parents and school districts better predictability of litigation outcomes, which will allow them to reach an early consensus on the IEP for a child with disabilities. In turn, this will reduce the time and money spent on litigation by school districts that could better be spent on the education of children with disabilities. *See generally* Perry A. Zirkel &

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[11] A majority of children with disabilities served by the IDEA are disadvantaged because they go to school in federal appellate jurisdictions that have not adopted the substantial benefit standard. Thus, only about 19% of children with disabilities are in jurisdictions that apply the substantial benefit standard compared with approximately 40% in jurisdictions that apply the just-above-trivial standard. The remaining children are in jurisdictions that appear to apply the just-above-trivial standard or are internally conflicted or have not endorsed a specific level of review. *Compare* U.S. Dep't of Education, Office of Special Education and Rehabilitative Services, *37th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*, 223 (Dec. 2015) (state by state table), http://www2.ed.gov/about/reports/annual/osep/2015/parts-b-c/37th-arc-for-idea.pdf *with* Cert. Pet. at 9-14.

James Newcomer, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD. 469 (1999) (finding a marked increase in litigation from 1975 to 1995); Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 EDUC. LAW REP. 1 (2011) (finding a steady, rather dramatic increase from 1970s through 2010).

For parents of children with autism, as well as other disabilities, predictability of litigation outcomes could avoid the stress of a lawsuit in their already overburdened lives. *See* Jane Gross, *For Families of Autistic, the Fight for Ordinary*, N.Y. TIMES, Oct. 22, 2004, at A1 (raising children with autism is "a relentless, labor-intensive and harrowing task, overwhelmingly performed by mothers, that tests the strength of marriages, the resilience of siblings and the endurance of the women themselves, autism educators and medical professionals say"). *See generally* Laura A. Schieve, et al., *The Relationship Between Autism and Parenting Stress*, 119 PEDIATRICS S1, S114, S115, S121 (2007).

Finally, a uniform standard will serve those parents without other educational prospects for their child and without the resources to litigate, and will at least mitigate, if not eliminate, the undesirable jurisdiction-dependent nature of an IDEA education.[12] At the same time, it will end the

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[12] One study found that almost 25% of children with disabilities are living in poverty, compared with 16% of children

unseemly conflict among the courts of appeals in an area of supreme importance to the nation and its children with disabilities.

III. Review Is Warranted Given the Dramatic Increase In the Diagnoses of Children With Autism and Other Disabilities, and Developments Post-*Rowley* of Effective Classroom Interventions and Assistive Technology

As demonstrated by the IDEA case law, the just-above-trivial standard lowers educational expectations for the ever increasing number of children with autism disorders and other disabilities served by the IDEA. A standard that lowers expectations is especially undesirable because, since *Rowley*, new interventions and remarkable assistive technologies have dramatically expanded the ability of these children to access an education.

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in the general population. *See* Mary Wagner, et al., Special Education Elementary Longitudinal Study: The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households, at 28 (2002), http://files.eric.ed.gov/fulltext/ED475794.pdf. While this case involves a claim for reimbursement for tuition at a private school, the standard for judging whether Drew received a FAPE applies to a challenge to an IEP by, for example, impoverished parents of a child who remains in the public school. See generally *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009).

A. The Increase in the Diagnosis of Autism Spectrum Disorders and Other Disabilities

Overall, the number of children with disabilities served by the IDEA has grown rapidly. In 1976-77, the IDEA served 3.69 million children with disabilities. By 2012-13, that number was more than 6.4 million. U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics (2014) ("NCES Statistics").[13] Within that population, the number of children with ASD has grown even more rapidly.[14]

Since 2000, the estimated total number of American children diagnosed with ASD has increased from one in every 150 children in 2002 to one in every 68 in 2010, a 123% increase over just eight years. Centers for Disease Control and Prevention ("CDC"), *Prevalence of Autism Spectrum Disorder Among Children Aged 8 Years — Autism and Developmental Disabilities Monitoring Network, 11 Sites, United States, 2010*, 63 MORBIDITY & MORTALITY WKLY. REP. 2, 8 (March 28, 2014). For boys, the number is as high as 1 in every 42. *Id.*[15]

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[13] Available at http://nces.ed.gov/programs/digest/d14/tables/dt14_204.30.asp.

[14] Autism was added to the IDEA's list of covered disabilities in 1990. 20 U.S.C. § 1401.

[15] The estimates are based on "information collected from the health and special education (if available) records of children who were 8 years old and lived in areas of Alabama, Arizona, Arkansas, Colorado, Georgia, Maryland, Missouri, New

Correspondingly, the number of children receiving special education services for ASD under the IDEA has risen steeply. In 1992-93, shortly after the Department of Education began collecting statistics, approximately 20,000 children were classified as autistic under the IDEA. *Special Education: Children With Autism*, U.S. Government Accountability Office (Jan. 2005) at 17.[16] By 2002-03, that number had risen to 137,000 children. NCES Statistics, *supra* at 12 (citing 2002-03 statistics). By 2012-13, the number had risen to 498,000 children – an almost twenty-five fold increase since 1992-93. *Id.*

B. Applied Behavior Analysis Is an Evidence Based, Effective Intervention for ASD

The 2004 amendments to the IDEA require schools to use instructional practices and interventions "based on peer-reviewed research to the extent practicable." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). For children with ASD, public health agencies and leading child and mental health organizations have endorsed ABA based on such research.[17] *See, e.g.*, CDC, *Autism Spectrum Disorder*

Jersey, North Carolina, Utah, and Wisconsin in 2010." CDC, *10 Things to Know About New Autism Data* (Mar. 31, 2014), http://www.cdc.gov/features/dsautismdata/index.html.

[16] Available at http://www.gao.gov/assets/250/245066.pdf.

[17] ABA became widely accepted post-*Rowley* after several successful research studies in the late 1980s and early 1990s. Koenig M. Gerenser, *SLP-ABA: Collaborating to support*

(ASD) (Feb. 24, 2015)[18] ("ABA has become widely accepted among health care professionals"); U.S. Dep't of Health & Human Servs. et al., *Mental Health: A Report of the Surgeon General*, 163-64 (1999) ("Thirty years of research demonstrated the efficacy of applied behavioral methods . . ."); [19] Scott M. Myers, Chris Plauché Johnson, the Council on Children With Disabilities, *Management of Children With Autism Spectrum Disorders*, 120 PEDIATRICS 5 (Nov. 2007) ("[t]he effectiveness of ABA-based intervention in ASDs has been well documented through 5 decades of research by using single-subject methodology and in controlled studies of comprehensive early behavioral intervention programs in university and community settings.") (footnotes omitted). Relevant to the education of children with ASD, a 2011 review of twenty-seven studies published in peer-reviewed literature demonstrated that this intervention was effective for improving language, cognitive skills, and reducing anxiety and aggression in children with ASD. Geraldine Dawson & Karen Burner, *Behavioral interventions in children and adolescents with autism spectrum*

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individuals with communication impairments, 1 J. OF SPEECH & LANGUAGE PATHOLOGY – APPLIED BEHAVIOR ANALYSIS 1, 3-4 (2006); *see also* n.6, *supra* at 7.

[18] Available at http://www.cdc.gov/ncbddd/autism/treatment.html.

[19] Available at http://profiles.nlm.nih.gov/ps/access/NNBBHS.pdf.

disorder: a review of recent findings, 23 CURR. OPIN. PEDIATR. 6, 616-20 (2011).

C. Assistive Technologies That Did Not Exist When *Rowley* Was Decided Offer Children With Disabilities Greater Access to an Education

In 1997, the IDEA was amended to require IEP support teams to consider the assistive technology needs of all children with disabilities. 20 U.S.C. § 1414(d)(3)(B)(v).[20] Assistive technology helps children with disabilities in myriad ways that could not have been anticipated when *Rowley* was decided. For example, with respect to socio-behavioral impairments, such as autism, a software application called Mind Reader teaches children social skills by helping them to recognize facial expressions and emotions in others. Sara (Beth) Cardwell Foreman, Doctoral Dissertation, *Assistive Technologies used by Students With Asperger's Syndrome to Improve Performance in the General Education Classroom*, at 22 (2014).[21]

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[20] The IDEA defines an "assistive technology device" as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of a child with a disability." 20 U.S.C. § 1401(1)(A).

[21] Available at http://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1007& context=gscis_etd.

For children with physical disabilities, "technology can give access to learning opportunities previously closed to them. E-readers help students turn book pages without applying dexterity, and voice adaptive software can help students answer questions without needing to write." Kris Zorigian & Jennifer Job, *How do special education students benefit from technology?*, LEARN NC, UNC-Chapel Hill School of Education (2010).[22]

Other technologies include "alphabet eye gaze frames allowing children to 'point' to letters with their eyes, onscreen keyboards that are controlled by switches, and electronic flipcharts." *Id.* For visually-impaired students, screen reader software can read aloud information from e-books and web-pages, while refreshable braille peripheral devices can actively translate that information into braille. Assistive Training Online Project, Sch. of Pub. Health and Health Professions, SUNY-Buffalo, *Reading & Computing*.[23]

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[22] Available at http://www.learnnc.org/lp/pages/6917.

[23] Available at http://atto.buffalo.edu/registered/ATBasics/Populations/Blind/reading.php.

IV. Since *Rowley* Was Decided 34 Years Ago, Congress Has Enacted Amendments to the IDEA and Related Legislation That Support the Substantial Benefit Standard Rejected by the Tenth Circuit

Review is warranted because of the dynamic changes to the IDEA and national policy for educating children with disabilities since *Rowley* was decided in 1982.[24] *See generally*, U.S. Dep't of Educ., Office of Special Educ. and Rehab. Servs., *Thirty-five Years of Progress in Educating Children With Disabilities Through IDEA*, 6 (2010) ("DOE Report").[25] As *Rowley* noted, at that time "federal support for education of the handicapped [was] a fairly recent development," and therefore Congress passed the IDEA "primarily to make public education *available* to handicapped children." 458 U.S. at 191-92 (emphasis added). Further, the words "assistive technologies" did not appear in the original statute, and autism was not a covered IDEA disability. (As noted earlier, it was only added to the list of IDEA covered disabilities in 1990).

In 1994, Congress began moving away from access-based education and towards outcomes-based education with the enactment of the Goals 2000:

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[24] The IDEA was enacted as the Education of All Handicapped Children Act, Pub. L. 94-142, until renamed in 1990. Pub L. 101-476.

[25] Available at https://www2.ed.gov/about/offices/list/osers/idea35/history/idea-35-history.pdf.

Educate America Act, 20 U.S.C. 5801 et seq. The Act established a framework for meeting National Education Goals by "establishing valid and reliable mechanisms for . . . assisting in the development and certification of high-quality assessment measures that reflect the internationally competitive content and student performance standards." 20 U.S.C. § 5801(4). One goal stressed increasing school "partnerships" with parents to "promot[e] the social, emotional and academic growth of children," including "children with disabilities." *Id.* § 5812(8)(A), § 5812(8)(B)(i).

In 1997, when it reauthorized the IDEA, Congress updated the goals and nature of an appropriate education under the IDEA through amendments that required the design of IEPs to "meet their [children with disabilities] unique needs" and prepare them for "further education, employment, and independent living[.]" 20 U.S.C. § 1400(d)(1)(A). And, as noted earlier, Congress recognized the potential of assistive technologies "to maximize accessibility [to the classroom] for children with disabilities." 20 U.S.C. § 1400(c)(5)(H); *see also* § 1414(d)(3)(B)(v). Thus, referring to 1997 amendments to the IDEA, this Court observed, "[a]fter examining the States' progress under IDEA, Congress found in 1997 that substantial gains had been made in the area of special education but that more needed to be done to guarantee children with disabilities adequate access to appropriate services." *Forest Grove Sch. Dist.*, 557 U.S. at 239-240.

In 2001, Congress enacted the No Child Left Behind Act ("NCLB"). The NCLB was enacted to assure that "all children" obtain "a high-quality education" so that they can "at a minimum, [achieve] proficiency on challenging State academic achievement standards and state academic assessments." 20 U.S.C. § 6301. The "high quality education" standard expressly applied to children with disabilities. *Id.* § 6301(2). Indeed, the NCLB requires that State assessment systems be designed "to ensure that students are meeting challenging State academic achievement and content standards and increasing achievement overall, but especially for the disadvantaged." *Id.* § 6301(6).[26]

In 2004 Congress again amended and reauthorized the IDEA, finding that "[a]lmost 30 years of research and experience" has shown that education of children with disabilities can be made more effective by having high expectations and ensuring their access to the classroom to "the maximum extent feasible." 20 U.S.C. § 1400(c)(5)(A)(i). The importance of high expectations was further emphasized by the mandate

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[26] The Department of Education, the agency responsible for administering both the IDEA and the NCLB, recognized the complementary nature of the two statutes by stating that "IDEA legislation should complement, support, and expand on the ESEA [Elementary and Secondary Education Act, reauthorized as NCLB] provisions that address the education of all children and not be viewed in isolation or as the sole legislative provision supporting children with disabilities." DOE Report at 12.

that schools produce progress reports for children with disabilities commensurate with the same frequency as they produce those reports for children without disabilities. *Id.;* § 1414(d)(1)(A)(i)(III); U.S. Dep't of Educ., Dear Colleague Letter: Clarification of FAPE and Alignment with State Academic Standards 1 (Nov. 16, 2015) http://1.usa.gov/1MkxyAE (children with disabilities should be given "rigorous academic standards," emphasizing the importance of having "high expectations" for them in 2015).

In 2009, state leaders, including governors and state commissioners of education from 48 states, two territories and the District of Columbia, developed the Common Core State Standards Initiative ("CCSS") that created common, college and career ready standards in mathematics and English language arts. *See* CCSS, *Frequently Asked Questions.*[27] These standards, which apply to children with disabilities in kindergarten through 12th grade,[28] "outline what a student should know and be able to do at the end of each grade," and "were created to ensure that all students graduate from

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[27] Available at http://www.corestandards.org/about-the standards/frequently-asked-questions/.

[28] *See* http://www.corestandards.org/wp-content/uploads/Application-to-Students-with-Disabilities-again-for-merge1.pdf ("These common standards provide a historic opportunity to improve access to rigorous academic content standards for students with disabilities.").

high school with the skills and knowledge necessary to succeed in college, career, and life . . . ." *Id.*, *About the Standards*.[29] Over 40 states and territories have adopted the CCSS. *Id.*

While restating and raising the goals of an IDEA education Congress did not alter the definition of a FAPE. But that definition does not address the level of educational benefit that an IEP must seek to attain. And, as *Rowley* observed, "[l]ike many statutory definitions, this one tends toward the cryptic rather than the comprehensive, but that is scarcely a reason for abandoning the quest for legislative intent." *Rowley*, 458 U.S. at 188. This case presents the Court with the opportunity to complete that "quest" in light of the amendments to the IDEA and the NCLB, which demand high educational expectations and require that public schools prepare children with disabilities for further education, employment and independent living. Those Congressional goals cannot be reconciled with the just-above-trivial standard endorsed by the Tenth Circuit below.

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[29] Available at http://www.corestandards.org/about-the-standards/.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court grant the petition for a *writ of certiorari*.

Respectfully
Submitted,

DANIEL R. UNUMB
AUTISM SPEAKS LEGAL
RESOURCE CENTER
863 Corley Mill Road
Lexington, SC 29072
803-520-8080
daniel.unumb@autismspeaks.org

GREGORY J. WALLANCE
Counsel of Record
W. STEWART WALLACE
KAYE SCHOLER LLP
250 West 55th Street
New York, New York 10019
(212) 836-8000
gregory.wallance@kayescholer.com

JENNIFER R. CLARKE
PUBLIC INTEREST LAW CENTER
1709 Benjamin Franklin
Parkway
Philadelphia, PA 19103
215-627-7100
jclarke@pilcop.org

Counsel for Amici Curiae[30]

January 22, 2016

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[30] Counsel for the *Amici* wish to acknowledge the invaluable assistance of John Hunt and Ricardo Doriott, first-year associates at Kaye Scholer, in the preparation of this brief.

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
NOV 14 2016
OFFICE OF THE CLERK

No. 15-827

IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PAARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

JOINT APPENDIX

Neal Kumar Katyal
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@
hoganlovells.com

Counsel of Record for Respondent

Jack D. Robinson
SPIES, POWERS &
ROBINSON, P.C.
950 South Cherry Street
Suite 700
Denver, CO 80246
(303) 830-7090
robinson@sprlaw.net

Counsel of Record for Petitioner

Petition for Writ of Certiorari Filed: December 22, 2015
Certiorari Granted: September 29, 2016

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U.S. DISTRICT COURT
DISTRICT OF COLORADO (Denver)

Endrew F. v. Douglas County School District RE-1
Civil Docket Case No. 1:12-CV-02620-LTB

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
10/02/2012	1	COMPLAINT against Douglas County School District RE-1 (Filing fee $ 350, Receipt Number 1082-3045989), filed by Endrew F. (Attachments: #1 Civil Cover Sheet) (Robinson, Jack) (Entered: 10/02/2012)
11/30/2012	13	ANSWER to 1 Complaint by Douglas County School District RE-1. (Ross, Robert) (Entered: 11/30/2012)
03/25/2013	22	PLAINTIFF'S OPENING BRIEF re 15 Administrative Record by Plaintiffs Endrew F., Jennifer F., Joseph F. (Robinson, Jack) (Entered: 03/25/2013)
05/14/2013	27	PLAINTIFF'S REPLY BRIEF re 15 Administrative Record by Plaintiffs Endrew F., Jennifer F., Joseph F. (Robinson, Jack) Modified on 5/14/2013 to correct text (jjhsl,). (Entered: 05/14/2013)
04/30/2013	24	DEFENDANT'S RESPONSE

		BRIEF re 15 Administrative Record by Defendant Douglas County School District RE-1. (Ross, Robert) (Entered: 04/30/2013)
09/15/2014	29	ORDER affirming the Administrative Court Agency Decision, by Judge Lewis T. Babcock on 9/15/2014. (eseam) (Entered: 09/15/2014)
09/15/2014	30	FINAL JUDGMENT in favor of Douglas County School District RE-1 against Endrew F., Jennifer F., and Joseph F. pursuant to 29 Order, by Clerk on 9/15/2014. (eseam) (Entered: 09/15/2014)
10/09/2014	31	NOTICE OF APPEAL as to 29 Order, 30 Clerk's Judgment by Plaintiffs Endrew F., Jennifer F., Joseph F. (Filing fee $ 505, Receipt Number 1082-4085024) (Robinson, Jack) (Entered: 10/09/2014)

U.S. COURT OF APPEALS
FOR THE TENTH CIRCUIT

Endrew F. v. Douglas County School District
Court of Appeals Docket No. 14-1417

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
10/09/2014	[10214264] Civil case docketed. Preliminary record filed. DATE RECEIVED: 10/09/2014 Docketing statement due 10/23/2014 for Endrew F., Jennifer F. and Joseph F. Transcript order form due 10/23/2014 for Jack David Robinson. Notice of appearance due on 10/23/2014 for Douglas County School District RE-1, Endrew F., Jennifer F. and Joseph F. [14-1417]
12/19/2014	[10234617] Appellant/Petitioner's brief filed by Endrew F., Jennifer F. and Joseph F. 7 paper copies to be provided to the court. Served on 12/19/2014 by email. Oral argument requested? Yes. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. –[Edited 12/24/2014 by SDS to upload attachments to entry] –[Edited 12/30/2014 by AD to attach errata sheet] [14-1417] JDR

02/02/2015	[10244822] Appellee/Respondent's brief filed by Douglas County School District RE-1. 7 paper copies to be provided to the court. Served on: 02/02/2015. Manner of service: email. Oral argument requested? No. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. –[Edited 02/03/2015 by SDS to cite as deficient] –[Edited 02/03/2015 by KF to attach errata sheet to correct deficiency] [14-1417] RSR
02/20/2015	[10249577] Appellant/Petitioner's reply brief filed by Endrew F., Jennifer F. and Joseph F. 7 paper copies to be provided to the court. Served on 02/20/2015. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [14-1417] JDR
05/06/2015	[10269666] Case argued by Jack Robinson for the Appellants; Robert Ross for the Appellee; and submitted to Judges Hartz, Tymkovich and Phillips. [14-1417]
08/25/2015	[10297138] Affirmed; Terminated on the merits after oral hearing; Written, signed, published; Judges Hartz, Tymkovich (authoring) and Phillips. Mandate to issue. [14-1417]

08/25/2015	[10297139] Judgment for opinion filed. [14-1417]
09/02/2015	[10299671] Petition for rehearing en banc filed by Endrew F., Jennifer F. and Joseph F. Original and 12 copies. Served on 09/02/2015. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [14-1417] JDR
09/02/2015	[10299712] Petition for rehearing, for rehearing en banc filed by Endrew F., Jennifer F. and Joseph F. Served on 09/02/2015. Manner of Service: email. For internal purposes to show panel and en banc review. [14-1417]
09/24/2015	[10304999] Order filed by Judges Hartz, Tymkovich and Phillips denying Appellants' petition for rehearing and for rehearing en banc filed by Appellants Endrew F., Joseph F. and Jennifer F. [14-1417]
10/02/2015	[10307189] Mandate issued. [14-1417]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

Endrew F., a minor, by and through his parents and next friends, JOSEPH and JENNIFER F.,

Plaintiffs,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE 1,

Defendant.

COMPLAINT

Plaintiff, Endrew F., a minor, by and through his parents and next friends, Joseph and Jennifer F., through counsel Spies, Powers & Robinson, P.C., submit the following Complaint.

I. PARTIES

1. Plaintiff, Endrew F., is a child with a disability as that term is defined in the Individuals With Disabilities Act (IDEA), 20 U.S.C. § 1401(3), and Colorado's Exceptional Children's Educational Act (ECEA), Colo. Rev. Stat. § 22-20-103(5)(a)(I). Joseph and Jennifer F. (Parents) are the natural parents of Endrew F. pursuant to 20 U.S.C. § 1401(23(A), and C.R.S. § 22-20-103(19.7)(a)(1). Endrew F. and Parents are permanent residents of Douglas County School District Re 1.

2. Defendant, Douglas County School District Re 1 ("School District"), is a school district organized under the laws of the State of Colorado, C.R.S. § 22-30-101 et. seq. and as defined by the ECEA at C.R.S. § 22-20-103(22). The School District is a "local educational

agency" ("LEA") as that term is defined in 20 U.S.C. § 1401(19)(A).

II. JURISDICTION AND VENUE

3. This Court has jurisdiction to hear this matter pursuant to 20 U.S.C. § 1415(i)(2)(A) and 20 U.S.C. § 1331.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)[.]

III. GENERAL ALLEGATIONS

5. Under the IDEA, states must ensure that a free appropriate public education ("FAPE") is provided to students with disabilities. 20 U.S.C. § 1412(a)(1)(A).

6. A FAPE consists of special education and related services that meet the standards of the State educational agency[1] and are provided in conformance with an individualized education program ("IEP"). 20 U.S.C. § 1401(9).

7. An IEP is a written statement of the child's present levels of educational performance, including how the child's disability affects his involvement and progress in the general curriculum, a statement of measurable annual goals and short term objectives, a statement of special education services that are to be provided to the child, and an explanation of the extent to which the child will not participate with non-disabled students. 20 U.S.C. §§ 1401(14) and 1414(d)(1)(A).

8. Special education consists of instruction that is specially designed to meet the unique needs of the child. 20 U.S.C. § 1401(29).

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[1] The Colorado Department of Education ("CDE") is the State educational agency for Colorado.

9. Parents who believe that the LEA, i.e., the school district, has not met its obligations under the IDEA may file a due process complaint to have the dispute resolved at an impartial due process hearing conducted by the SEA. 20 U.S.C. § 1415(f)(1)(A); 1 C.C.R. 301-8, 2220-R-6.02(7).[2] In Colorado, the due process hearing is conducted by an administrative law judge ("ALJ") with the Colorado Office of Administrative Courts. ECEA Rule 6.02(7.5)(c).

10. A party aggrieved by the findings and decision of the ALJ has the right to bring a civil action in federal court. 20 U.S.C. § 1415(i)(2)(A); ECEA Rule 6.02(7.5(j). The reviewing court receives the record of the administrative proceedings and bases its decision on the preponderance of the evidence in the record. 20 U.S.C. § 1415(C).

11. Endrew F. is a child with autism and is eligible for special education and related services under the IDEA. 20 U.S.C. §§ 1401 *et seq.*

12. Autism, as that term is defined in the IDEA, "is a developmental disability significantly affecting verbal and nonverbal communication and social interaction . . . that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistence to environmental change or change in daily routines, and unusual

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[2] References to the Rules (for the) Administration of the Exceptional Children's Educational Act will be hereafter cited as "ECEA Rule ____." In relevant part, the ECEA Rules were amended effective July 1, 2011. All actions relevant to this educational dispute took place subsequent to July 1, 2011.

responses to sensory experiences." 34 C.F.R. § 300.8(c)(1)(I).

13. Endrew F. was born on September 28, 1999, and was diagnosed with autism when he was two years old. In 2003, Drew was also diagnosed with Attention Deficit/Hyperactivity Disorder ("ADHD").

14. Endrew F. struggles with the ability to functionally communicate personal needs, emotions and initiations, and does not engage or interact with others in social routines or play. He has compulsive and perseverative behaviors that he has difficulty overcoming throughout the day which interfere with his learning environment and which creates a major barrier to his ability to participate and be available to learn.

15. Endrew F. also has many maladaptive behaviors that interfere with his ability to participate in the learning environment, including: eloping, dropping to the ground, climbing, loud vocalizations, perseverative language, and picking/scraping. In addition, Endrew F. presents with many severe fears, such as using a new or public bathroom, which severely limits his ability to be in school or in the community.

16. Endrew F. has been attending Firefly Autism House (Firefly), a private school that specializes in the education of children with autism like Endrew F., since May of 2010. Before Endrew F. enrolled at Firefly, Endrew F. attended Summit View Elementary School ("Summit View") in the School District.

17. Beginning in Endrew F.'s first grade, Parents developed significant concerns over Endrew F.'s lack of academic, social and behavioral progress at school. Parents communicated their concerns to the school

about the inappropriateness of Endrew F.'s special educational program and the lack of support he was receiving.

18. Endrew F. stopped making progress in his first grade year and his maladaptive and disruptive behaviors drastically increased.

19. In his second grade year, the School District changed Endrew F.'s IEP from trying to educate Endrew to managing his escalating problem behaviors. Endrew continued to deteriorate under this program which resulted in a change of schools, from Heritage Elementary to Summit View.

20. During Endrew F.'s fourth grade year, his ability to function at school and access the educational environment became noticeably worse. Endrew F. bolted from the classroom frequently and ran out of the school building and into the street on one occasion. He urinated and defecated on the floor of the "calming room" twice without school personnel realizing what had occurred. He was unable to use the toilet at school. According to school records, Endrews F.' problem behaviors included climbing furniture, falling off furniture, hitting computers or TV screens, yelling, kicking others, kicking walls, head banging, and asking others to punish him. School personnel called Parents on a frequent basis to come and pick up Endrew F. due to their inability to address his needs.

21. In April 2010, the School District convened a meeting to develop an IEP for the 2010 - 2011 school year. The IEP presented to the Parents was not substantively different than the IEPs that had failed to provide Endrew F. an appropriate education in the

past. The IEP evidenced that Endrew F. had made no measurable progress on his goals and objectives.

22. Despite Endrew F.'s known maladaptive and disruptive behaviors that prevented his ability to access education, the School District failed to ever conduct a functional behavioral assessment, develop appropriate positive behavioral interventions, supports or strategies, or develop an appropriate behavior intervention plan as required by the IDEA.

23. The School District's April 2010 IEP was not reasonably calculated to provide Endrew F. an appropriate education. Accordingly, the Parents rejected the educational placement and program proposed by the School District and enrolled Endrew F. at Firefly, and requested that the School District pay for the costs associated with this private educational placement and program. The School District refused.

24. At Firefly, Endrew F. has been able to access education and learn. He is progressing academically, socially and behaviorally and is meeting appropriate goals commensurate with his potential. Endrew F.'s anxieties and problem behaviors have decreased. At Firely, Endrew F. is able to self-calm and is able to attend to the instruction and program provided to him to learn. Firefly has demonstrated the ability to provide Endrew an appropriate education.

25. It was uncontested at the due process hearing that Endrew F. is making substantial academic, social and behavioral progress at Firefly.

26. On February 21, 2012, Parents filed a due process complaint with the Colorado Department of Education and the School District's Special Education Director pursuant to the dispute resolution procedures

set forth in the IDEA (20 U.S.C. § 1415(f)), its implementing regulations (34 C.F.R. §§ 300.507 - 300.511), and the ECEA Rules (ECEA Rule 6.02(7.5)).

27. The due process hearing was held before an ALJ at the Colorado Office of Administrative Courts between June 6 - 8, 2012.

28. The ALJ issued her Agency Decision on July 9, 2012. While the ALJ found that many of the goals in Endrew F.'s IEP remained the same year after year and that Endrew F. did not make progress towards many of those goals and objectives, the ALJ nevertheless determined that Endrew F. made some progress. The ALJ failed to identify any goals or objectives on which Endrew F. made progress.

29. The ALJ "found merit" in Parents' argument that the School District failed to properly document or report to Parents Endrew F.'s progress (or lack thereof) as required by the IDEA. Nevertheless, the ALJ found that the absence of progress reporting did not amount to a substantive denial of FAPE.

30. The ALJ found that the School District failed to perform a functional behavioral assessment either before or after it drafted a behavior intervention plan in 2007. The ALJ recognized that a behavior intervention plan was not discussed or modified before the April 2012 IEP Meeting and that the April 2012 IEP fails to include a behavior intervention plan. Nevertheless, the ALJ found, incorrectly, that "Neither a FBA or a BIP are required components of an IEP."

IV. FIRST CLAIM FOR RELIEF

(Violation of 20 U.S.C. § 1414)

31. Plaintiff incorporates the allegations set forth above as if fully set forth herein.

32. The School District's proposed IEP violated the IDEA and failed to ensure the provision of a FAPE by its failure to include compliant statements of measurable annual goals and short-term objectives, including academic and functional goals, that were reasonably designed to meet Endrew F.'s needs that result from his disabilities to enable him to be involved in and make progress in the general curriculum.

33. The School District's proposed IEP violated the IDEA and failed to ensure the provision of a FAPE by its failure to include compliant statements of measurable annual goals and short-term objectives, including academic and functional goals, that were reasonably designed to meet each of Endrew F.'s educational needs that result from his disabilities.

34. The School District's proposed IEP violated the IDEA and failed to ensure the provision of a FAPE by its failure to include a statement of how Endrew F.'s progress toward meeting the goals and objectives will be measured.

35. The School District's proposed IEP violated the IDEA and failed to ensure the provision of a FAPE by its failure to include a statement of when periodic reports on the progress Endrew F. was making (or not making) toward meeting the annual goals and objectives.

36. The School District violated the IDEA by its failure to provide the Parents with appropriate reports on the progress Endrew F. was made (or failed to make) toward meeting the annual goals and objectives, which deprived the Parents' ability to meaningfully

participate in Endrew F.'s education and the development of Endrew F.'s IEPs.

37. The School District violated the IDEA by its failure to conduct a functional behavioral assessment.

38. The School District violated the IDEA by its failure to develop and appropriate behavior intervention plan.

39. The School District's proposed IEP violated the IDEA and failed to ensure the provision of a FAPE by its failure to include a behavior intervention plan based on a functional behavioral assessment.

40. The School District violated the IDEA in the development of the proposed IEP by its failure to consider the concerns of the Parents for enhancing the education of Endrew F. and failing to consider all of the academic, developmental, and functional needs of Endrew F.

41. The School District violated the IDEA in the development of the proposed IEP by its failure to consider the use of positive behavioral interventions and supports, and other strategies to address Endrew F.'s known maladaptive and disruptive behaviors that impeded his learning.

42. The School District violated the IDEA in the development of the proposed IEP by its failure to address Endrew F.'s lack of progress toward the annual goals and objectives included in Endrew F.'s prior IEPs.

43. The foregoing violations of the IDEA, individually and cumulatively, resulted in a denial of a FAPE to Endrew F.

V. SECOND CLAIM FOR RELIEF

(Violation of 20 U.S.C. § 1412)

44. Plaintiff incorporates the allegations set forth above as if fully set forth herein.

45. The IDEA requires that the School District make a free appropriate public education available to all children with disabilities, including Endrew F.

46. The School District's procedural and substantive violations of the IDEA resulted in a denial of a free appropriate public education to Endrew F.

VI. REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in his favor, reverse the ALJ's Agency Decision, enter an order directing the School District to reimburse the Parents for the costs associated with Endrew F.'s educational placement at Firefly, enter an order that the proposed IEP is not reasonably calculated to provide Endrew F. An appropriate education and that Firefly provides Endrew F. an appropriate education, and award Parents their costs and attorney fees and such other relief as the Court deems just and proper.

Respectfully submitted on October 2, 2012,

SPIES, POWERS & ROBINSON, P.C.

s/ Jack D. Robinson
Jack D. Robinson, #22037
1660 Lincoln Street, Suite 2220
Denver, Colorado 80264
Telephone: (303) 830-7090
Facsimile: (303) 830-7089
Attorneys for Plaintiff

MATERIALS IN THE COLORADO DEPARTMENT OF EDUCATION OFFICE OF ADMINISTRATIVE COURTS

DUE PROCESS COMPLAINT

DATE: February 21, 2012

Notice to the School District

For School District Use Only
Date received by the School District:

TO: Don Bell, Director of Special Education
Address: Douglass County School District
Special Education Department
620 Wilcox
Castle Rock, CO 80104

FROM: Joseph and Jennifer F. on behalf of their son, Endrew F.
Address: [Redacted]
Phone Number(s) [Redacted]

Please check whether you will be represented by an attorney or assisted by an advocate.

X Attorney _____ Advocate

Name of Attorney: Jack D. Robinson
Address: 1660 Lincoln Street,
Suite 2220
Denver, Colorado
80264
Phone Number: 303-830-7090 Fax Number: 303-830-7089
I/we are requesting: X Due Process Hearing

Required Information

On Behalf of:

Child's name:	Endrew F.	Firefly Autism House
Address (if: different from parent's address)	Same as Parent's address	School the student attends

Please describe the nature of the problem with the school and any facts relating to the problems (attach additional pages if necessary):

Endrew F. is a 13 year-old boy with a diagnosis of autism. He struggles with the ability to functionally communicate personal needs, emotions and initiations, and does not engage or interact with others in social routines or play. Endrew has compulsive and perseverative behaviors that he has difficulty overcoming throughout the day which interfere with his learning environment and which creates a major barrier to his ability to participate and be available to learn. Endrew also has many maladaptive behaviors that interfere with his ability to participate in the learning environment, including: eloping, dropping to the ground, climbing, loud vocalizations, perseverative language, and picking/scraping. Also, Endrew presents with many severe fears, such as using a new or public bathroom, which severely limits his ability to be in school or in the community.

Endrew has been attending Firefly Autism House (Firefly), a private school that specializes in the education of children with autism like Endrew, since May of 2010. Before Endrew was enrolled at Firefly,

Endrew attended Summit View Elementary School ("Summit View") in the Douglas County School District ("School District"). Beginning in Endrew's first grade, the [parents] developed significant concerns over Endrew's lack of academic, social and behavioral progress at school. They communicated their concerns to the school about the inappropriateness of Endrew' s special educational program and the lack of support he was receiving. Endrew was incontinent at school, obsessed over objects that were intended to help stay on task, and frequently tried to bolt from the classroom. The [parents'] offer to have Endrew's psychologist observe Endrew in the classroom and provide support to Endrew' *s* school team with social and behavioral recommendations was refused by the School District.

Endrew stopped making progress in his first grade year and his disruptive behaviors drastically increased. In his second grade year, the School District changed Endrew's IEP from trying to educate Endrew to managing his escalating problem behaviors. Endrew continued deteriorate under this program which resulted in a change of schools, from Heritage Elementary to Summit View.

During Endrew's fourth grade year, his ability to function at school and access the educational environment became noticeably worse. Endrew bolted from the classroom frequently and ran out of the school building and into the street on one occasion. He urinated and defecated on the floor of the "calming room" twice without school personnel realizing what had occurred. He was unable to use the toilet at school. According to school records, Endrews' problem behaviors included climbing furniture, falling off furniture, hitting computers or TV screens, yelling,

kicking others, kicking walls, head banging, and asking others to punish him. School personnel called Mrs. F. on an almost daily basis to come and pick up Endrew due to their inability to address his needs.

In April 2010, the School District convened a meeting to develop an Individualized Educational Program (IEP) for the 2010 - 2011 school year. The IEP presented to the Parents was not substantively different than the IEPs that had failed to provide Endrew an appropriate education in the past. The School District demonstrated that it was unable to provide Endrew an education. The Parents rejected the educational placement and program proposed by the School District as being not reasonably calculated to provide Endrew an appropriate education.

The Parents withdrew Endrew from the School District and enrolled Endrew at Firefly, and requested that the School District pay for the costs associated with this private educational placement and program. The School District refused.

In the relatively brief amount of time Endrew has attended Firefly, Endrew has been able to access education and learn. He is progressing academically, socially and behaviorally and is meeting appropriate goals commensurate with his potential. Endrew's anxieties and problem behaviors have decreased and Endrew and because Firefly addressed Endrew's restroom phobia, he is able to use the toilet at Firefly. Reports from Firely note that Endrew is able to self-calm and is able to attend to the instruction and program provided to him to learn. Firefly has demonstrated the ability to provide Endrew an appropriate education. The School District's repeated failure to address Endrew's individualized needs and

provide him with any educational benefit in a public school setting requires the School District to provide for Endrew's educational needs by placement at Firefly.

Please describe how this problem could be resolved (attache additional pages if necessary):

Placement by the School District at Firefly, including transportation to and from school, and reimbursement of the costs associated with Endrew's placement at Firefly from May 2010 to the present.

Attorney Signature *Jack D. Robinson* Date 2/21/2012

20 U.S.C.A. § 1400

§1400. Short title; findings; purposes

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act."

(b) Omitted

(c) Findings

Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142), the educational needs of millions of children with disabilities were not being fully met because –

(A) the children did not receive appropriate educational services;

(B) the children were excluded entirely from the public school system and from being educated with their peers;

(C) undiagnosed disabilities prevented the children from having a successful educational experience; or

(D) a lack of adequate resources within the public school system forced families to find services outside the public school system.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

(4) However, the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

(5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by –

(A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to –

(i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and

(ii) be prepared to lead productive and independent adult lives, to the maximum extent possible;

(B) strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to

participate in the education of their children at school and at home;

(C) coordinating this chapter with other local, educational service agency, State, and Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 6301 et seq.], in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent;

(D) providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate;

(E) supporting high-quality, intensive preservice preparation and professional development for all personnel who work with children with disabilities in order to ensure that such personnel have the skills and knowledge necessary to improve the academic achievement and functional performance of children with disabilities, including the use of scientifically based instructional practices, to the maximum extent possible;

(F) providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children;

(G) focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results; and

(H) supporting the development and use of technology, including assistive technology devices and assistive technology services, to maximize accessibility for children with disabilities.

(6) While States, local educational agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.

(7) A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals.

(8) Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways.

(9) Teachers, schools, local educational agencies, and States should be relieved of irrelevant and unnecessary paperwork burdens that do not lead to improved educational outcomes.

(10)(A) The Federal Government must be responsive to the growing needs of an increasingly diverse society.

(B) America's ethnic profile is rapidly changing. In 2000, 1 of every 3 persons in the United States was a member of a minority group or was limited English proficient.

(C) Minority children comprise an increasing percentage of public school students.

(D) With such changing demographics, recruitment efforts for special education personnel should focus on increasing the participation of minorities in the teaching profession in order to provide appropriate role models with sufficient knowledge to address the special education needs of these students.

(11)(A) The limited English proficient population is the fastest growing in our Nation, and the growth is occurring in many parts of our Nation.

(B) Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education.

(C) Such discrepancies pose a special challenge for special education in the referral of, assessment of, and provision of services for, our Nation's students from non-English language backgrounds.

(12)(A) Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.

(B) More minority children continue to be served in special education than would be

expected from the percentage of minority students in the general school population.

(C) African-American children are identified as having intellectual disabilities and emotional disturbance at rates greater than their White counterparts.

(D) In the 1998-1999 school year, African-American children represented just 14.8 percent of the population aged 6 through 21, but comprised 20.2 percent of all children with disabilities.

(E) Studies have found that schools with predominately White students and teachers have placed disproportionately high numbers of their minority students into special education.

(13)(A) As the number of minority students in special education increases, the number of minority teachers and related services personnel produced in colleges and universities continues to decrease.

(B) The opportunity for full participation by minority individuals, minority organizations, and Historically Black Colleges and Universities in awards for grants and contracts, boards of organizations receiving assistance under this chapter, peer review panels, and training of professionals in the area of special education is essential to obtain greater success in the education of minority children with disabilities.

(14) As the graduation rates for children with disabilities continue to climb, providing effective

transition services to promote successful post-school employment or education is an important measure of accountability for children with disabilities.

(d) **Purposes**

The purposes of this chapter are –

(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

20 U.S.C.A. § 1401

§ 1401. Definitions

Except as otherwise provided in this chapter:

(1) Assistive technology device

(A) In general

The term "assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of a child with a disability.

(B) Exception

The term does not include a medical device that is surgically implanted, or the replacement of such device.

(2) Assistive technology service

The term "assistive technology service" means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. Such term includes –

(A) the evaluation of the needs of such child, including a functional evaluation of the child in the child's customary environment;

(B) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by such child;

(C) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

(D) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(E) training or technical assistance for such child, or, where appropriate, the family of such child; and

(F) training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of such child.

(3) Child with a disability

(A) In general

The term "child with a disability" means a child–

(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, her health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

(B) Child aged 3 through 9

The term "child with a disability" for a child aged 3 through 9 (or any subset of that age range, including ages 3 through 5), may, at the discretion of the State and the local educational agency, include a child–

(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in 1 or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development; and

(ii) who, by reason thereof, needs special education and related services.

(4) Repealed. Pub.L. 114-95, Title IX, § 9215(ss)(1)(A), Dec. 10, 2015, 129 Stat. 2181

(5) Educational service agency

The term "educational service agency" –

(A) means a regional public multiservice agency–

(i) authorized by State law to develop, manage, and provide services or programs to local educational agencies; and

(ii) recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary schools and secondary schools of the State; and

(B) includes any other public institution or agency having administrative control and direction over a public elementary school or secondary school.

(6) Elementary school

The term "elementary school" means a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law.

(7) Equipment

The term "equipment" includes –

(A) machinery, utilities, and built-in equipment, and any necessary enclosures or structures to house such machinery, utilities, or equipment; and

(B) all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture; printed, published, and audiovisual instructional materials; telecommunications, sensory, and other technological aids and devices; and books, periodicals, documents, and other related materials.

(8) Excess costs

The term "excess costs" means those costs that are in excess of the average annual per-student expenditure in a local educational agency during the preceding school year for an elementary school or

secondary school student, as may be appropriate, and which shall be computed after deducting –

(A) amounts received –

(i) under subchapter II;

(ii) under part A of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § et seq.]; and

(iii) under part A of title III of that Act; and

(B) any State or local funds expended for programs that would qualify for assistance under any of those parts.

(9) Free appropriate public education

The term "free appropriate public education" means special education and related services that –

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(10) Repealed. Pub.L. 114-95, Title IX, § 9214(d)(1), Dec. 10, 2015, 129 Stat. 2164

(11) Homeless children

The term "homeless children" has the meaning given the term "homeless children and youths" in section 11434a of Title 42.

(12) Indian

The term "Indian" means an individual who is a member of an Indian tribe.

(13) Indian tribe

The term "Indian tribe" means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaska Native village or regional village corporation (as defined in or established under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)).

(14) Individualized education program; IEP

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title.

(15) Individualized family service plan

The term "individualized family service plan" has the meaning given the term in section 1436 of this title.

(16) Infant or toddler with a disability

The term "infant or toddler with a disability" has the meaning given the term in section 1432 of this title.

(17) Institution of higher education

The term "institution of higher education" –

(A) has the meaning given the term in section 1001 of this title; and

(B) also includes any community college receiving funding from the Secretary of the Interior under the Tribally Controlled Colleges and Universities Assistance Act of 1978.

(18) Limited English proficient

The term "limited English proficient" has the meaning given the term "English learner" in section 8101 of the Elementary and Secondary Education Act of 1965.

(19) Local educational agency

(A) In general

The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools.

(B) Educational service agencies and other public institutions or agencies

This term includes –

(i) an educational service agency; and

(ii) any other public institution or agency having administrative control and direction

of a public elementary school or secondary school.

(C) BIA funded schools

The term includes an elementary school or secondary school funded by the Bureau of Indian Affairs, but only to the extent that such inclusion makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the local educational agency receiving assistance under his chapter with the smallest student population, except that the school shall not be subject to the jurisdiction of any State educational agency other than the Bureau of Indian Affairs.

(20) Native language

The term "native language", when used with respect to an individual who is limited English proficient, means the language normally used by the individual or, in the case of a child, the language normally used by the parents of the child.

(21) Nonprofit

The term "nonprofit", as applied to a school, agency, organization, or institution, means a school, agency, organization, or institution owned and operated by 1 or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(22) Outlying area

The term "outlying area" means the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(23) Parent

The term "parent" means –

(A) a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent);

(B) a guardian (but not the State if the child is a ward of the State);

(C) an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or

(D) except as used in sections 1415(b)(2) and 1439(a)(5) of this title, an individual assigned under either of those sections to be a surrogate parent.

(24) Parent organization

The term "parent organization" has the meaning given the term in section 1471(g) of this title.

(25) Parent training and information center

The term "parent training and information center" means a center assisted under section 1471 or 1472 of this title.

(26) Related services

(A) In general

The term "related services" means transportation, and such developmental,

corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

(B) Exception

The term does not include a medical device that is surgically implanted, or the replacement of such device.

(27) Secondary school

The term "secondary school" means a nonprofit institutional day or residential school, including a public secondary charter school, that provides secondary education, as determined under State law, except that it does not include any education beyond grade 12.

(28) Secretary

The term "Secretary" means the Secretary of Education.

(29) Special education

The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including –

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

(30) Specific learning disability

(A) In general

The term "specific learning disability" means a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.

(B) Disorders included

Such term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and

developmental aphasia.

(C) Disorders not included

Such term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of intellectual disabilities,

of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(31) State

The term "State" means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas.

(32) State educational agency

The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(33) Supplementary aids and services

The term "supplementary aids and services" means aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with section 1412(a)(5) of this title.

(34) Transition services

The term "transition services" means a coordinated set of activities for a child with a disability that –

(A) is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including

supported employment), continuing and adult education, adult services, independent living, or community participation;

(B) is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and

(C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

(35) Universal design

The term "universal design" has the meaning given the term in section 3002 of Title 29.

(36) Ward of the State

(A) In general

The term "ward of the State" means a child who, as determined by the State where the child resides, is a foster child, is a ward of the State, or is in the custody of a public child welfare agency.

(B) Exception

The term does not include a foster child who has a foster parent who meets the definition of a parent in paragraph (23).

20 U.S.C.A. § 1412

§ 1412. State eligibility

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

(1) Free appropriate public education

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

(B) Limitation

The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children –

(i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges; and

(ii) aged 18 through 21 to the extent that State law does not require that special education and related services under this subchapter be provided to children with

disabilities who, in the educational placement prior to their incarceration in an adult correctional facility –

(I) were not actually identified as being a child with a disability under section 1401 of this title; or

(II) did not have an individualized education program under this subchapter.

(C) State flexibility

A State that provides early intervention services in accordance with subchapter III to a child who is eligible for services under section 1419 of this title, is not required to provide such child with a free appropriate public education.

(2) Full educational opportunity goal

The State has established a goal of providing full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal.

(3) Child find

(A) In general

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine

which children with disabilities are currently receiving needed special education and related services.

(B) Construction

Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.

(4) Individualized education program

An individualized education program, or an individualized family service plan that meets the requirements of section 1436(d) of this title, is developed, reviewed, and revised for each child with a disability in accordance with section 1414(d) of this title.

(5) Least restrictive environment

(A) In general

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(B) Additional requirement

(i) In general

A State funding mechanism shall not result in placements that violate the requirements of subparagraph (A), and a State shall not use a funding mechanism by which the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability a free appropriate public education according to the unique needs of the child as described in the child's IEP.

(ii) Assurance

If the State does not have policies and procedures to ensure compliance with clause (i), the State shall provide the Secretary an assurance that the State will revise the funding mechanism as soon as feasible to ensure that such mechanism does not result in such placements.

(6) Procedural safeguards

(A) In general

Children with disabilities and their parents are afforded the procedural safeguards required by section 1415 of this title.

(B) Additional procedural safeguards

Procedures to ensure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities for services under this chapter will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures

shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(7) Evaluation

Children with disabilities are evaluated in accordance with subsections (a) through (c) of section 1414 of this title.

(8) Confidentiality

Agencies in the State comply with section 1417(c) of this title (relating to the confidentiality of records and information).

(9) Transition from subchapter III to preschool programs

Children participating in early intervention programs assisted under subchapter III, and who will participate in preschool programs assisted under this subchapter, experience a smooth and effective transition to those preschool programs in a manner consistent with section 1437(a)(9) of this title. By the third birthday of such a child, an individualized education program or, if consistent with sections 1414(d)(2)(B) and 1436(d) of this title, an individualized family service plan, has been developed and is being implemented for the child. The local educational agency will participate in transition planning conferences arranged by the designated lead agency under section 1435(a) (10) of this title.

(10) Children in private schools

(A) Children enrolled in private schools by their parents

(i) In general

To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary schools and secondary schools in the school district served by a local educational agency, provision is made for the participation of those children in the program assisted or carried out under this subchapter by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f):

(I) Amounts to be expended for the provision of those services (including direct services to parentally placed private school children) by the local educational agency shall be equal to a proportionate amount of Federal funds made available under this subchapter.

(II) In calculating the proportionate amount of Federal funds, the local educational agency, after timely and meaningful consultation with representatives of private schools as described in clause (iii), shall conduct a thorough and complete child find process to determine the number of parentally

placed children with disabilities attending private schools located in the local educational agency.

(III) Such services to parentally placed private school children with disabilities may be provided to the children on the premises of private, including religious, schools, to the extent consistent with law.

(IV) State and local funds may supplement and in no case shall supplant the proportionate amount of Federal funds required to be expended under this subparagraph.

(V) Each local educational agency shall maintain in its records and provide to the State educational agency the number of children evaluated under this subparagraph, the number of children determined to be children with disabilities under this paragraph, and the number of children served under this paragraph.

(ii) Child find requirement

(I) In general

The requirements of paragraph (3) (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including religious, elementary schools and secondary schools.

(II) Equitable participation

The child find process shall be designed to ensure the equitable participation of

parentally placed private school children with disabilities and an accurate count of such children.

(III) Activities

In carrying out this clause, the local educational agency, or where applicable, the State educational agency, shall undertake activities similar to those activities undertaken for the agency's public school children.

(IV) Cost

The cost of carrying out this clause, including individual evaluations, may not be considered in determining whether a local educational agency has met its obligations under clause (i).

(V) Completion period

Such child find process shall be completed in a time period comparable to that for other students attending public schools in the local educational agency.

(iii) Consultation

To ensure timely and meaningful consultation, a local educational agency, or where appropriate, a State educational agency, shall consult with private school representatives and representatives of parents of parentally placed private school children with disabilities during the design and development of special education and related services for the children, including regarding –

(I) the child find process and how parentally placed private school children suspected of having a disability can participate equitably, including how parents, teachers, and private school officials will be informed of the process;

(II) the determination of the proportionate amount of Federal funds available to serve parentally placed private school children with disabilities under this subparagraph, including the determination of how the amount was calculated;

(III) the consultation process among the local educational agency, private school officials, and representatives of parents of parentally placed private school children with disabilities, including how such process will operate throughout the school year to ensure that parentally placed private school children with disabilities identified through the child find process can meaningfully participate in special education and related services;

(IV) how, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities, including a discussion of types of services, including direct services and alternate service delivery mechanisms, how such services will be apportioned if funds are insufficient to serve all children, and how

and when these decisions will be made; and

(V) how, if the local educational agency disagrees with the views of the private school officials on the provision of services or the types of services, whether provided directly or through a contract, the local educational agency shall provide to the private school officials a written explanation of the reasons why the local educational agency chose not to provide services directly or through a contract.

(iv) Written affirmation

When timely and meaningful consultation as required by clause (iii) has occurred, the local educational agency shall obtain a written affirmation signed by the representatives of participating private schools, and if such representatives do not provide such affirmation within a reasonable period of time, the local educational agency shall forward the documentation of the consultation process to the State educational agency.

(v) Compliance

(I) In general

A private school official shall have the right to submit a complaint to the State educational agency that the local educational agency did not engage in consultation that was meaningful and

timely, or did not give due consideration to the views of the private school official.

(II) Procedure

If the private school official wishes to submit a complaint, the official shall provide the basis of the noncompliance with this subparagraph by the local educational agency to the State educational agency, and the local educational agency shall forward the appropriate documentation to the State educational agency. If the private school official is dissatisfied with the decision of the State educational agency, such official may submit a complaint to the Secretary by providing the basis of the noncompliance with this subparagraph by the local educational agency to the Secretary, and the State educational agency shall forward the appropriate documentation to the Secretary.

(vi) Provision of equitable services

(I) Directly or through contracts

The provision of services pursuant to this subparagraph shall be provided –

(aa) by employees of a public agency; or

(bb) through contract by the public agency with an individual, association, agency, organization, or other entity.

(II) Secular, neutral, nonideological

Special education and related services provided to parentally placed private school children with disabilities, including materials and equipment, shall be secular, neutral, and nonideological.

(vii) Public control of funds

The control of funds used to provide special education and related services under this subparagraph, and title to materials, equipment, and property purchased with those funds, shall be in a public agency for the uses and purposes provided in this chapter, and a public agency shall administer the funds and property.

(B) Children placed in, or referred to, private schools by public agencies

(i) In general

Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

(ii) Standards

In all cases described in clause (i), the State educational agency shall determine whether

such schools and facilities meet standards that apply to State educational agencies and local educational agencies and that children so served have all the rights the children would have if served by such agencies.

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement

The cost of reimbursement described in clause (ii) may be reduced or denied –

(I) if –

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(iv) Exception

Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement –

(I) shall not be reduced or denied for failure to provide such notice if –

(aa) the school prevented the parent from providing such notice;

(bb) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(I); or

(cc) compliance with clause (iii)(I) would likely result in physical harm to the child; and

(II) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if –

(aa) the parent is illiterate or cannot write in English; or

(bb) compliance with clause (iii)(I) would likely result in serious emotional harm to the child.

(11) State educational agency responsible for general supervision

(A) In general

The State educational agency is responsible for ensuring that –

(i) the requirements of this subchapter are met;

(ii) all educational programs for children with disabilities in the State, including all such programs administered by any other State agency or local agency –

(I) are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and

(II) meet the educational standards of the State educational agency; and

(iii) in carrying out this subchapter with respect to homeless children, the requirements of subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.) are met.

(B) Limitation

Subparagraph (A) shall not limit the responsibility of agencies in the State other than the State educational agency to provide, or pay for some or all of the costs of, a free appropriate public education for any child with a disability in the State.

(C) Exception

Notwithstanding subparagraphs (A) and (B), the Governor (or another individual pursuant to State law), consistent with State law, may assign to any public agency in the State the responsibility of ensuring that the requirements of this subchapter are met with respect to children with disabilities who are

convicted as adults under State law and incarcerated in adult prisons.

(12) Obligations related to and methods of ensuring services

(A) Establishing responsibility for services

The Chief Executive Officer of a State or designee of the officer shall ensure that an interagency agreement or other mechanism for interagency coordination is in effect between each public agency described in subparagraph (B) and the State educational agency, in order to ensure that all services described in subparagraph (B)(i) that are needed to ensure a free appropriate public education are provided, including the provision of such services during the pendency of any dispute under clause (iii). Such agreement or mechanism shall include the following:

(i) Agency financial responsibility

An identification of, or a method for defining, the financial responsibility of each agency for providing services described in subparagraph (B)(i) to ensure a free appropriate public education to children with disabilities, provided that the financial responsibility of each public agency described in subparagraph (B), including the State medicaid agency and other public insurers of children with disabilities, shall precede the financial responsibility of the local educational agency (or the State agency responsible for developing the child's IEP).

(ii) Conditions and terms of reimbursement

The conditions, terms, and procedures under which a local educational agency shall be reimbursed by other agencies.

(iii) Interagency disputes

Procedures for resolving interagency disputes (including procedures under which local educational agencies may initiate proceedings) under the agreement or other mechanism to secure reimbursement from other agencies or otherwise implement the provisions of the agreement or mechanism.

(iv) Coordination of services procedures

Policies and procedures for agencies to determine and identify the interagency coordination responsibilities of each agency to promote the coordination and timely and appropriate delivery of services described in subparagraph (B)(i).

(B) Obligation of public agency

(i) In general

If any public agency other than an educational agency is otherwise obligated under Federal or State law, or assigned responsibility under State policy pursuant to subparagraph (A), to provide or pay for any services that are also considered special education or related services (such as, but not limited to, services described in section 1401(1) relating to assistive technology devices, 1401(2) relating to assistive

technology services, 1401(26) relating to related services, 1401(33) relating to supplementary aids and services, and 1401(34) relating to transition services) that are necessary for ensuring a free appropriate public education to children with disabilities within the State, such public agency shall fulfill that obligation or responsibility, either directly or through contract or other arrangement pursuant to subparagraph (A) or an agreement pursuant to subparagraph (C).

(ii) Reimbursement for services by public agency

If a public agency other than an educational agency fails to provide or pay for the special education and related services described in clause (i), the local educational agency (or State agency responsible for developing the child's IEP) shall provide or pay for such services to the child. Such local educational agency or State agency is authorized to claim reimbursement for the services from the public agency that failed to provide or pay for such services and such public agency shall reimburse the local educational agency or State agency pursuant to the terms of the interagency agreement or other mechanism described in subparagraph (A)(i) according to the procedures established in such agreement pursuant to subparagraph (A)(ii).

(C) Special rule

The requirements of subparagraph (A) may be met through –

(i) State statute or regulation;

(ii) signed agreements between respective agency officials that clearly identify the responsibilities of each agency relating to the provision of services; or

(iii) other appropriate written methods as determined by the Chief Executive Officer of the State or designee of the officer and approved by the Secretary.

(13) Procedural requirements relating to local educational agency eligibility

The State educational agency will not make a final determination that a local educational agency is not eligible for assistance under this subchapter without first affording that agency reasonable notice and an opportunity for a hearing.

(14) Personnel qualifications

(A) In general

The State educational agency has established and maintains qualifications to ensure that personnel necessary to carry out this subchapter are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.

(B) Related services personnel and paraprofessionals

The qualifications under subparagraph (A) include qualifications for related services personnel and paraprofessionals that –

(i) are consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services;

(ii) ensure that related services personnel who deliver services in their discipline or profession meet the requirements of clause (i) and have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(iii) allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulation, or written policy, in meeting the requirements of this subchapter to be used to assist in the provision of special education and related services under this subchapter to children with disabilities.

(C) Qualifications for special education teachers

The qualifications described in subparagraph (A) shall ensure that each person employed as a special education teacher in the State who teaches elementary school, middle school, or secondary school –

(i) has obtained full State certification as a special education teacher (including participating in an alternate route to certification as a special educator, if such alternate route meets minimum requirements described in section 2005.56(a)(2)(ii) of title 34, Code of Federal Regulations, as such section was in effect on November 28, 2008), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher, except with respect to any teacher teaching in a public charter school who shall meet the requirements set forth in the State's public charter school law;

(ii) has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(iii) holds at least a bachelor's degree.

(D) Policy

In implementing this section, a State shall adopt a policy that includes a requirement that local educational agencies in the State take measurable steps to recruit, hire, train, and retain personnel who meet the applicable requirements described in this paragraph to provide special education and related services under this subchapter to children with disabilities.

(E) Rule of construction

Notwithstanding any other individual right of action that a parent or student may maintain under this subchapter, nothing in this paragraph shall be construed to create a right of action on behalf of an individual student for the failure of a particular State educational agency or local educational agency staff person to meet the applicable requirements described in this paragraph, or to prevent a parent from filing a complaint about staff qualifications with the State educational agency as provided for under this subchapter.

(15) Performance goals and indicators

The State –

(A) has established goals for the performance of children with disabilities in the State that –

(i) promote the purposes of this chapter, as stated in section 1400(d) of this title;

(ii) are the same as the State's long-term goals and measurements of interim progress for children with disabilities under section 6311(c)(4)(A)(i) of this title;

(iii) address graduation rates and dropout rates, as well as such other factors as the State may determine; and

(iv) are consistent, to the extent appropriate, with any other goals and standards for children established by the State;

(B) has established performance indicators the State will use to assess progress toward

achieving the goals described in subparagraph (A), including measurements of interim progress for children with disabilities under section 6311(c) (4)(A)(i) of this title; and

(C) will annually report to the Secretary and the public on the progress of the State, and of children with disabilities in the State, toward meeting the goals established under subparagraph (A), which may include elements of the reports required under section 6311(h) of this title.

(16) Participation in assessments

(A) In general

All children with disabilities are included in all general State and districtwide assessment programs, including assessments described under section 6311 of this title, with appropriate accommodations and alternate assessments where necessary and as indicated in their respective individualized education programs.

(B) Accommodation guidelines

The State (or, in the case of a districtwide assessment, the local educational agency) has developed guidelines for the provision of appropriate accommodations.

(C) Alternate assessments

(i) In general

The State (or, in the case of a districtwide assessment, the local educational agency) has developed and implemented guidelines

for the participation of children with disabilities in alternate assessments for those children who cannot participate in regular assessments under subparagraph (A) with accommodations as indicated in their respective individualized education programs.

(ii) Requirements for alternate assessments

The guidelines under clause (i) shall provide for alternate assessments that –

(I) are aligned with the challenging State academic content standards under section 6311(b)(1) of this title and alternate academic achievement standards under section 6311(b)(1)(E) of this title; and

(II) if the State has adopted alternate academic achievement standards permitted under section 6311(b)(1)(E) of this title, measure the achievement of children with disabilities against those standards.

(iii) Conduct of alternate assessments

The State conducts the alternate assessments described in this subparagraph.

(D) Reports

The State educational agency (or, in the case of a districtwide assessment, the local educational agency) makes available to the public, and reports to the public with the same frequency and in the same detail as it reports

on the assessment of nondisabled children, the following:

(i) The number of children with disabilities participating in regular assessments, and the number of those children who were provided accommodations in order to participate in those assessments.

(ii) The number of children with disabilities participating in alternate assessments described in subparagraph (C) (ii)(I).

(iii) The number of children with disabilities participating in alternate assessments described in subparagraph (C) (ii)(II).

(iv) The performance of children with disabilities on regular assessments and on alternate assessments (if the number of children with disabilities participating in those assessments is sufficient to yield statistically reliable information and reporting that information will not reveal personally identifiable information about an individual student), compared with the achievement of all children, including children with disabilities, on those assessments.

(E) Universal design

The State educational agency (or, in the case of a districtwide assessment, the local educational agency) shall, to the extent feasible, use universal design principles in developing and administering any assessments under this paragraph.

(17) Supplementation of State, local, and other Federal funds

(A) Expenditures

Funds paid to a State under this subchapter will be expended in accordance with all the provisions of this subchapter.

(B) Prohibition against commingling

Funds paid to a State under this subchapter will not be commingled with State funds.

(C) Prohibition against supplantation and conditions for waiver by Secretary

Except as provided in section 1413 of this title, funds paid to a State under this subchapter will be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this subchapter and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive, in whole or in part, the requirements of this subparagraph if the Secretary concurs with the evidence provided by the State.

(18) Maintenance of State financial support

(A) In general

The State does not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year.

(B) Reduction of funds for failure to maintain support

The Secretary shall reduce the allocation of funds under section 1411 of this title for any fiscal year following the fiscal year in which the State fails to comply with the requirement of subparagraph (A) by the same amount by which the State fails to meet the requirement.

(C) Waivers for exceptional or uncontrollable circumstances

The Secretary may waive the requirement of subparagraph (A) for a State, for 1 fiscal year at a time, if the Secretary determines that –

(i) granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State; or

(ii) the State meets the standard in paragraph (17)(C) for a waiver of the requirement to supplement, and not to supplant, funds received under this subchapter.

(D) Subsequent years

If, for any year, a State fails to meet the requirement of subparagraph (A), including any year for which the State is granted a waiver under subparagraph (C), the financial support required of the State in future years under subparagraph (A) shall be the amount that would have been required in the absence of that failure and not the reduced level of the State's support.

(19) Public participation

Prior to the adoption of any policies and procedures needed to comply with this section (including any amendments to such policies and procedures), the State ensures that there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities.

(20) Rule of construction

In complying with paragraphs (17) and (18), a State may not use funds paid to it under this subchapter to satisfy State-law mandated funding obligations to local educational agencies, including funding based on student attendance or enrollment, or inflation.

(21) State advisory panel

(A) In general

The State has established and maintains an advisory panel for the purpose of providing policy guidance with respect to special education and related services for children with disabilities in the State.

(B) Membership

Such advisory panel shall consist of members appointed by the Governor, or any other official authorized under State law to make such appointments, be representative of the State population, and be composed of individuals involved in, or concerned with, the education of children with disabilities, including –

(i) parents of children with disabilities (ages birth through 26);

(ii) individuals with disabilities;

(iii) teachers;

(iv) representatives of institutions of higher education that prepare special education and related services personnel;

(v) State and local education officials, including officials who carry out activities under subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.);

(vi) administrators of programs for children with disabilities;

(vii) representatives of other State agencies involved in the financing or delivery of related services to children with disabilities;

(viii) representatives of private schools and public charter schools;

(ix) not less than 1 representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities;

(x) a representative from the State child welfare agency responsible for foster care; and

(xi) representatives from the State juvenile and adult corrections agencies.

(C) Special rule

A majority of the members of the panel shall be individuals with disabilities or parents of children with disabilities (ages birth through 26).

(D) Duties

The advisory panel shall –

(i) advise the State educational agency of unmet needs within the State in the education of children with disabilities;

(ii) comment publicly on any rules or regulations proposed by the State regarding the education of children with disabilities;

(iii) advise the State educational agency in developing evaluations and reporting on data to the Secretary under section 1418 of this title;

(iv) advise the State educational agency in developing corrective action plans to address findings identified in Federal monitoring reports under this subchapter; and

(v) advise the State educational agency in developing and implementing policies relating to the coordination of services for children with disabilities.

(22) Suspension and expulsion rates

(A) In general

The State educational agency examines data, including data disaggregated by race and ethnicity, to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities –

(i) among local educational agencies in the State; or

(ii) compared to such rates for nondisabled children within such agencies.

(B) Review and revision of policies

If such discrepancies are occurring, the State educational agency reviews and, if appropriate, revises (or requires the affected State or local educational agency to revise) its policies, procedures, and practices relating to the development and implementation of IEPs, the use of positive behavioral interventions and supports, and procedural safeguards, to ensure that such policies, procedures, and practices comply with this chapter.

(23) Access to instructional materials

(A) In general

The State adopts the National Instructional Materials Accessibility Standard for the purposes of providing instructional materials to blind persons or other persons with print disabilities, in a timely manner after the publication of the National Instructional

Materials Accessibility Standard in the Federal Register.

(B) Rights of State educational agency

Nothing in this paragraph shall be construed to require any State educational agency to coordinate with the National Instructional Materials Access Center. If a State educational agency chooses not to coordinate with the National Instructional Materials Access Center, such agency shall provide an assurance to the Secretary that the agency will provide instructional materials to blind persons or other persons with print disabilities in a timely manner.

(C) Preparation and delivery of files

If a State educational agency chooses to coordinate with the National Instructional Materials Access Center, not later than 2 years after December 3, 2004, the agency, as part of any print instructional materials adoption process, procurement contract, or other practice or instrument used for purchase of print instructional materials, shall enter into a written contract with the publisher of the print instructional materials to –

(i) require the publisher to prepare and, on or before delivery of the print instructional materials, provide to the National Instructional Materials Access Center electronic files containing the contents of the print instructional materials using the National Instructional Materials Accessibility Standard; or

(ii) purchase instructional materials from the publisher that are produced in, or may be rendered in, specialized formats.

(D) Assistive technology

In carrying out this paragraph, the State educational agency, to the maximum extent possible, shall work collaboratively with the State agency responsible for assistive technology programs.

(E) Definitions

In this paragraph:

(i) National Instructional Materials Access Center

The term "National Instructional Materials Access Center" means the center established pursuant to section 1474(e) of this title.

(ii) National Instructional Materials Accessibility Standard

The term "National Instructional Materials Accessibility Standard" has the meaning given the term in section 1474(e)(3)(A) of this title.

(iii) Specialized formats

The term "specialized formats" has the meaning given the term in section 1474(e)(3)(D) of this title.

(24) Overidentification and disproportionality

The State has in effect, consistent with the purposes of this chapter and with section 1418(d) of this title, policies and procedures designed to prevent the

inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment described in section 1401 of this title.

(25) Prohibition on mandatory medication

(A) In general

The State educational agency shall prohibit State and local educational agency personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act (21 U.S.C. 801 et seq.) as a condition of attending school, receiving an evaluation under subsection (a) or (c) of section 1414 of this title, or receiving services under this chapter.

(B) Rule of construction

Nothing in subparagraph (A) shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services under paragraph (3).

(b) State educational agency as provider of free appropriate public education or direct services

If the State educational agency provides free appropriate public education to children with

disabilities, or provides direct services to such children, such agency –

(1) shall comply with any additional requirements of section 1413(a) of this title, as if such agency were a local educational agency; and

(2) may use amounts that are otherwise available to such agency under this subchapter to serve those children without regard to section 1413(a)(2)(A)(i) of this title (relating to excess costs).

(c) Exception for prior State plans

(1) In general

If a State has on file with the Secretary policies and procedures that demonstrate that such State meets any requirement of subsection (a), including any policies and procedures filed under this subchapter as in effect before the effective date of the Individuals with Disabilities Education Improvement Act of 2004, the Secretary shall consider such State to have met such requirement for purposes of receiving a grant under this subchapter.

(2) Modifications made by State

Subject to paragraph (3), an application submitted by a State in accordance with this section shall remain in effect until the State submits to the Secretary such modifications as the State determines necessary. This section shall apply to a modification to an application to the same extent and in the same manner as this section applies to the original plan.

(3) Modifications required by the Secretary

If, after the effective date of the Individuals with Disabilities Education Improvement Act of 2004, the provisions of this chapter are amended (or the regulations developed to carry out this chapter are amended), there is a new interpretation of this chapter by a Federal court or a State's highest court, or there is an official finding of noncompliance with Federal law or regulations, then the Secretary may require a State to modify its application only to the extent necessary to ensure the State's compliance with this subchapter.

(d) Approval by the Secretary

(1) In general

If the Secretary determines that a State is eligible to receive a grant under this subchapter, the Secretary shall notify the State of that determination.

(2) Notice and hearing

The Secretary shall not make a final determination that a State is not eligible to receive a grant under this subchapter until after providing the State –

(A) with reasonable notice; and

(B) with an opportunity for a hearing.

(e) Assistance under other Federal programs

Nothing in this chapter permits a State to reduce medical and other assistance available, or to alter eligibility, under titles V and XIX of the Social Security Act [42 U.S.C.A. §§ 701 et seq., 1396 et seq.] with respect to the provision of a free appropriate public education for children with disabilities in the State.

(f) By-pass for children in private schools

(1) In general

If, on December 2, 1983, a State educational agency was prohibited by law from providing for the equitable participation in special programs of children with disabilities enrolled in private elementary schools and secondary schools as required by subsection (a)(10)(A), or if the Secretary determines that a State educational agency, local educational agency, or other entity has substantially failed or is unwilling to provide for such equitable participation, then the Secretary shall, notwithstanding such provision of law, arrange for the provision of services to such children through arrangements that shall be subject to the requirements of such subsection.

(2) Payments

(A) Determination of amounts

If the Secretary arranges for services pursuant to this subsection, the Secretary, after consultation with the appropriate public and private school officials, shall pay to the provider of such services for a fiscal year an amount per child that does not exceed the amount determined by dividing –

(i) the total amount received by the State under this subchapter for such fiscal year; by

(ii) the number of children with disabilities served in the prior year, as reported to the Secretary by the State under section 1418 of this title.

(B) Withholding of certain amounts

Pending final resolution of any investigation or complaint that may result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State educational agency the amount the Secretary estimates will be necessary to pay the cost of services described in subparagraph (A).

(C) Period of payments

The period under which payments are made under subparagraph (A) shall continue until the Secretary determines that there will no longer be any failure or inability on the part of the State educational agency to meet the requirements of subsection (a)(10)(A).

(3) Notice and hearing

(A) In general

The Secretary shall not take any final action under this subsection until the State educational agency affected by such action has had an opportunity, for not less than 45 days after receiving written notice thereof, to submit written objections and to appear before the Secretary or the Secretary's designee to show cause why such action should not be taken.

(B) Review of action

If a State educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A), such agency may, not later than 60 days after notice of such action, file with the United States court

of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based the Secretary's action, as provided in section 2112 of Title 28.

(C) Review of findings of fact

The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive, but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Jurisdiction of court of appeals; review by United States Supreme Court

Upon the filing of a petition under subparagraph (B), the United States court of appeals shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

20 U.S.C.A. § 1414

§ 1414. Evaluations, eligibility determinations, individualized education programs, and educational placements

(a) Evaluations, parental consent, and reevaluations

(1) Initial evaluations

(A) In general

A State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation in accordance with this paragraph and subsection (b), before the initial provision of special education and related services to a child with a disability under this subchapter.

(B) Request for initial evaluation

Consistent with subparagraph (D), either a parent of a child, or a State educational agency, other State agency, or local educational agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

(C) Procedures

(i) In general

Such initial evaluation shall consist of procedures –

(I) to determine whether a child is a child with a disability (as defined in section 1401 of this title) within 60 days of receiving parental consent for the evaluation, or, if the State establishes a

timeframe within which the evaluation must be conducted, within such timeframe; and

(II) to determine the educational needs of such child.

(ii) **Exception**

The relevant timeframe in clause (i)(I) shall not apply to a local educational agency if –

(I) a child enrolls in a school served by the local educational agency after the relevant timeframe in clause (i)(I) has begun and prior to a determination by the child's previous local educational agency as to whether the child is a child with a disability (as defined in section 1401 of this title), but only if the subsequent local educational agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent local educational agency agree to a specific time when the evaluation will be completed; or

(II) the parent of a child repeatedly fails or refuses to produce the child for the evaluation.

(D) **Parental consent**

(i) **In general**

(I) **Consent for initial evaluation**

The agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability as

defined in section 1401 of this title shall obtain informed consent from the parent of such child before conducting the evaluation. Parental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services.

(II) Consent for services

An agency that is responsible for making a free appropriate public education available to a child with a disability under this subchapter shall seek to obtain informed consent from the parent of such child before providing special education and related services to the child.

(ii) **Absence of consent**

(I) For initial evaluation

If the parent of such child does not provide consent for an initial evaluation under clause (i)(I), or the parent fails to respond to a request to provide the consent, the local educational agency may pursue the initial evaluation of the child by utilizing the procedures described in section 1415 of this title, except to the extent inconsistent with State law relating to such parental consent.

(II) For services

If the parent of such child refuses to consent to services under clause (i)(II), the local educational agency shall not provide special education and related services to

the child by utilizing the procedures described in section 1415 of this title.

(III) Effect on agency obligations

If the parent of such child refuses to consent to the receipt of special education and related services, or the parent fails to respond to a request to provide such consent –

(aa) the local educational agency shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with the special education and related services for which the local educational agency requests such consent; and

(bb) the local educational agency shall not be required to convene an IEP meeting or develop an IEP under this section for the child for the special education and related services for which the local educational agency requests such consent.

(iii) Consent for wards of the State

(I) In general

If the child is a ward of the State and is not residing with the child's parent, the agency shall make reasonable efforts to obtain the informed consent from the parent (as defined in section 1401 of this title) of the child for an initial evaluation

to determine whether the child is a child with a disability.

(II) Exception

The agency shall not be required to obtain informed consent from the parent of a child for an initial evaluation to determine whether the child is a child with a disability if –

(aa) despite reasonable efforts to do so, the agency cannot discover the whereabouts of the parent of the child;

(bb) the rights of the parents of the child have been terminated in accordance with State law; or

(cc) the rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.

(E) Rule of construction

The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.

(2) Reevaluations

(A) In general

A local educational agency shall ensure that a reevaluation of each child with a disability is conducted in accordance with subsections (b) and (c) –

(i) if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(ii) if the child's parents or teacher requests a reevaluation.

(B) Limitation

A reevaluation conducted under subparagraph (A) shall occur –

(i) not more frequently than once a year, unless the parent and the local educational agency agree otherwise; and

(ii) at least once every 3 years, unless the parent and the local educational agency agree that a reevaluation is unnecessary.

(b) Evaluation procedures

(1) Notice

The local educational agency shall provide notice to the parents of a child with a disability, in accordance with subsections (b)(3), (b)(4), and (c) of section 1415 of this title, that describes any evaluation procedures such agency proposes to conduct.

(2) Conduct of evaluation

In conducting the evaluation, the local educational agency shall –

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining –

(i) whether the child is a child with a disability; and

(ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(3) Additional requirements

Each local educational agency shall ensure that –

(A) assessments and other evaluation materials used to assess a child under this section –

(i) are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer;

(iii) are used for purposes for which the assessments or measures are valid and reliable;

(iv) are administered by trained and knowledgeable personnel; and

(v) are administered in accordance with any instructions provided by the producer of such assessments;

(B) the child is assessed in all areas of suspected disability;

(C) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided; and

(D) assessments of children with disabilities who transfer from 1 school district to another school district in the same academic year are coordinated with such children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.

(4) Determination of eligibility and educational need

Upon completion of the administration of assessments and other evaluation measures –

(A) the determination of whether the child is a child with a disability as defined in section 1401(3) of this title and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5); and

(B) a copy of the evaluation report and the documentation of determination of eligibility shall be given to the parent.

(5) Special rule for eligibility determination

In making a determination of eligibility under paragraph (4)(A), a child shall not be determined to be a child with a disability if the determinant factor for such determination is –

(A) lack of appropriate instruction in reading, including in the essential components of reading instruction (as defined in section 6368(3) of this title, as such section was in effect on the day before December 10, 2015);

(B) lack of instruction in math; or

(C) limited English proficiency.

(6) Specific learning disabilities

(A) In general

Notwithstanding section 1406(b) of this title, when determining whether a child has a specific learning disability as defined in section

1401 of this title, a local educational agency shall not be required to take into consideration

whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expressions, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.

(B) Additional authority

In determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures described in paragraphs (2) and (3).

(c) Additional requirements for evaluation and reevaluations

(1) Review of existing evaluation data

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this section, the IEP Team and other qualified professionals, as appropriate, shall –

(A) review existing evaluation data on the child, including –

(i) evaluations and information provided by the parents of the child;

(ii) current classroom-based, local, or State assessments, and classroom-based observations; and

(iii) observations by teachers and related services providers; and

(B) on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine –

(i) whether the child is a child with a disability as defined in section 1401(3) of this title, and the educational needs of the child, or, in case of a reevaluation of a child, whether the child continues to have such a disability and such educational needs;

(ii) the present levels of academic achievement and related developmental needs of the child;

(iii) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and

(iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general education curriculum.

(2) Source of data

The local educational agency shall administer such assessments and other evaluation measures as may be needed to produce the data identified by the IEP Team under paragraph (1)(B).

(3) Parental consent

Each local educational agency shall obtain informed parental consent, in accordance with subsection

(a)(1)(D), prior to conducting any reevaluation of a child with a disability, except that such informed parental consent need not be obtained if the local educational agency can demonstrate that it had taken reasonable measures to obtain such consent and the child's parent has failed to respond.

(4) Requirements if additional data are not needed

If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability and to determine the child's educational needs, the local educational agency –

(A) shall notify the child's parents of –

(i) that determination and the reasons for the determination; and

(ii) the right of such parents to request an assessment to determine whether the child continues to be a child with a disability and to determine the child's educational needs; and

(B) shall not be required to conduct such an assessment unless requested to by the child's parents.

(5) Evaluations before change in eligibility

(A) In general

Except as provided in subparagraph (B), a local educational agency shall evaluate a child with a disability in accordance with this section

before determining that the child is no longer a child with a disability.

(B) Exception

(i) In general

The evaluation described in subparagraph (A) shall not be required before the termination of a child's eligibility under this subchapter due to graduation from secondary school with a regular diploma, or due to exceeding the age eligibility for a free appropriate public education under State law.

(ii) Summary of performance

For a child whose eligibility under this subchapter terminates under circumstances described in clause (i), a local educational agency shall provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals.

(d) Individualized education programs

(1) Definitions

In this chapter:

(A) Individualized education program

(i) In general

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed,

reviewed, and revised in accordance with this section and that includes –

(I) a statement of the child's present levels of academic achievement and functional performance, including –

(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to –

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on

the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child –

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)(**aa**) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412(a)(16)(A) of this title; and

(**bb**) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why –

(**AA**) the child cannot participate in the regular assessment; and

(**BB**) the particular alternate assessment selected is appropriate for the child;

(**VII**) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and

(**VIII**) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter –

(**aa**) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

(bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and

(cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title.

(ii) Rule of construction

Nothing in this section shall be construed to require –

(I) that additional information be included in a child's IEP beyond what is explicitly required in this section; and

(II) the IEP Team to include information under 1 component of a child's IEP that is already contained under another component of such IEP.

(B) Individualized education program team

The term "individualized education program team" or "IEP Team" means a group of individuals composed of –

(i) the parents of a child with a disability;

(ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

(iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;

(iv) a representative of the local educational agency who –

(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(II) is knowledgeable about the general education curriculum; and

(III) is knowledgeable about the availability of resources of the local educational agency;

(v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);

(vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(vii) whenever appropriate, the child with a disability.

(C) IEP Team attendance

(i) Attendance not necessary

A member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the local educational agency

agree that the attendance of such member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

(ii) Excusal

A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if –

(I) the parent and the local educational agency consent to the excusal; and

(II) the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

(iii) Written agreement and consent required

A parent's agreement under clause (i) and consent under clause (ii) shall be in writing.

(D) IEP Team transition

In the case of a child who was previously served under subchapter III, an invitation to the initial IEP meeting shall, at the request of the parent, be sent to the subchapter III service coordinator or other representatives of the subchapter III system to assist with the smooth transition of services.

(2) Requirement that program be in effect

(A) In general

At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program, as defined in paragraph (1)(A).

(B) Program for child aged 3 through 5

In the case of a child with a disability aged 3 through 5 (or, at the discretion of the State educational agency, a 2-year-old child with a disability who will turn age 3 during the school year), the IEP Team shall consider the individualized family service plan that contains the material described in section 1436 of this title, and that is developed in accordance with this section, and the individualized family service plan may serve as the IEP of the child if using that plan as the IEP is –

(i) consistent with State policy; and

(ii) agreed to by the agency and the child's parents.

(C) Program for children who transfer school districts

(i) In general

(I) Transfer within the same State

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local

educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.

(II) Transfer outside State

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation pursuant to subsection (a)(1), if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.

(ii) Transmittal of records

To facilitate the transition for a child described in clause (i) –

(I) the new school in which the child enrolls shall take reasonable steps to promptly obtain the child's records,

including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous school in which the child was enrolled, pursuant to section 99.31(a)(2) of title 34, Code of Federal Regulations; and

(II) the previous school in which the child was enrolled shall take reasonable steps to promptly respond to such request from the new school.

(3) Development of IEP

(A) In general

In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider –

(i) the strengths of the child;

(ii) the concerns of the parents for enhancing the education of their child;

(iii) the results of the initial evaluation or most recent evaluation of the child; and

(iv) the academic, developmental, and functional needs of the child.

(B) Consideration of special factors

The IEP Team shall –

(i) in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;

(ii) in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP;

(iii) in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) consider whether the child needs assistive technology devices and services.

(C) Requirement with respect to regular education teacher

A regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the

determination of appropriate positive behavioral interventions and supports, and other strategies, and the determination of supplementary aids and services, program modifications, and support for school personnel consistent with paragraph (1)(A)(i)(IV).

(D) Agreement

In making changes to a child's IEP after the annual IEP meeting for a school year, the parent of a child with a disability and the local educational agency may agree not to convene an IEP meeting for the purposes of making such changes, and instead may develop a written document to amend or modify the child's current IEP.

(E) Consolidation of IEP Team meetings

To the extent possible, the local educational agency shall encourage the consolidation of reevaluation meetings for the child and other IEP Team meetings for the child.

(F) Amendments

Changes to the IEP may be made either by the entire IEP Team or, as provided in subparagraph (D), by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent shall be provided with a revised copy of the IEP with the amendments incorporated.

(4) Review and revision of IEP

(A) In general

The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team –

(i) reviews the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved; and

(ii) revises the IEP as appropriate to address –

(I) any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate;

(II) the results of any reevaluation conducted under this section;

(III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B);

(IV) the child's anticipated needs; or

(V) other matters.

(B) Requirement with respect to regular education teacher

A regular education teacher of the child, as a member of the IEP Team, shall, consistent with paragraph (1)(C), participate in the review and revision of the IEP of the child.

(5) Multi-year IEP demonstration

(A) Pilot program

(i) Purpose

The purpose of this paragraph is to provide an opportunity for States to allow parents and local educational agencies the

opportunity for long-term planning by offering the option of developing a comprehensive multi-year IEP, not to exceed 3 years, that is designed to coincide with the natural transition points for the child.

(ii) Authorization

In order to carry out the purpose of this paragraph, the Secretary is authorized to approve not more than 15 proposals from States to carry out the activity described in clause (i).

(iii) Proposal

(I) In general

A State desiring to participate in the program under this paragraph shall submit a proposal to the Secretary at such time and in such manner as the Secretary may reasonably require.

(II) Content

The proposal shall include –

(aa) assurances that the development of a multi-year IEP under this paragraph is optional for parents;

(bb) assurances that the parent is required to provide informed consent before a comprehensive multi-year IEP is developed;

(cc) a list of required elements for each multi-year IEP, including –

(AA) measurable goals pursuant to paragraph (1)(A)(i)(II), coinciding with natural transition points for the child, that will enable the child to be involved in and make progress in the general education curriculum and that will meet the child's other needs that result from the child's disability; and

(BB) measurable annual goals for determining progress toward meeting the goals described in subitem (AA); and

(dd) a description of the process for the review and revision of each multi-year IEP, including –

(AA) a review by the IEP Team of the child's multi-year IEP at each of the child's natural transition points;

(BB) in years other than a child's natural transition points, an annual review of the child's IEP to determine the child's current levels of progress and whether the annual goals for the child are being achieved, and a requirement to amend the IEP, as appropriate, to enable the child to continue to meet the measurable goals set out in the IEP;

(CC) if the IEP Team determines on the basis of a review that the

child is not making sufficient progress toward the goals described in the multi-year IEP, a requirement that the local educational agency shall ensure that the IEP Team carries out a more thorough review of the IEP in accordance with paragraph (4) within 30 calendar days; and

(DD) at the request of the parent, a requirement that the IEP Team shall conduct a review of the child's multi-year IEP rather than or subsequent to an annual review.

(B) Report

Beginning 2 years after December 3, 2004, the Secretary shall submit an annual report to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate regarding the effectiveness of the program under this paragraph and any specific recommendations for broader implementation of such program, including –

(i) reducing –

(I) the paperwork burden on teachers, principals, administrators, and related service providers; and

(II) noninstructional time spent by teachers in complying with this subchapter;

(ii) enhancing longer-term educational planning;

(iii) improving positive outcomes for children with disabilities;

(iv) promoting collaboration between IEP Team members; and

(v) ensuring satisfaction of family members.

(C) Definition

In this paragraph, the term "natural transition points" means those periods that are close in time to the transition of a child with a disability from preschool to elementary grades, from elementary grades to middle or junior high school grades, from middle or junior high school grades to secondary school grades, and from secondary school grades to post-secondary activities, but in no case a period longer than 3 years.

(6) Failure to meet transition objectives

If a participating agency, other than the local educational agency, fails to provide the transition services described in the IEP in accordance with paragraph (1)(A)(i)(VIII), the local educational agency shall reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in the IEP.

(7) Children with disabilities in adult prisons

(A) In general

The following requirements shall not apply to children with disabilities who are convicted as

adults under State law and incarcerated in adult prisons:

(i) The requirements contained in section 1412(a)(16) of this title and paragraph (1)(A)(i)(VI) (relating to participation of children with disabilities in general assessments).

(ii) The requirements of items (aa) and (bb) of paragraph (1)(A)(i)(VIII) (relating to transition planning and transition services), do not apply with respect to such children whose eligibility under this subchapter will end, because of such children's age, before such children will be released from prison.

(B) Additional requirement

If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child's IEP Team may modify the child's IEP or placement notwithstanding the requirements of sections 1412(a)(5)(A) of this title and paragraph (1)(A) if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(e) Educational placements

Each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

(f) Alternative means of meeting participation

When conducting IEP team meetings and placement meetings pursuant to this section, section 1415(e) of

this title, and section 1415(f)(1)(B) of this title, and carrying out administrative matters under section 1415 of this title (such as scheduling, exchange of witness lists, and status conferences), the parent of a child with a disability and a local educational agency may agree to use alternative means of meeting participation, such as video conferences and conference calls.

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Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

SUPPLEMENTAL JOINT APPENDIX

Neal Kumar Katyal
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@
hoganlovells.com

Counsel of Record for Respondent

Jack D. Robinson
SPIES, POWERS & ROBINSON, P.C.
950 South Cherry Street
Suite 700
Denver, CO 80246
(303) 830-7090
robinson@sprlaw.net

Counsel of Record for Petitioner

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Douglas County School District Re.1 - Instructional Support Services
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0080

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Date of Meeting 10/31/07

Individualized Education Program (IEP) for [redacted] Andrew Robert

Student Information

DOB: [redacted]	LASID: 122955	SASID 122955	Medicaid #:
Home School: Summit View Elementary		School of Attendance: Heritage Elementary	
Grade: 1 Track: A		Ethnicity: White (not Hispanic)	
Age: 8yrs 1mos Gender: M		English Language learner?	Yes ☐ No ☒

Parent Information

Parent/Guardian	Parent/Guardian
Last Name: [redacted]	Last Name:
First name: Joe and Jennifer	First Name:
Address: [redacted]	Address:
City: [redacted]	City:
State: CO Zip: [redacted]	State: Zip
Home Phone: [redacted]	Home Phone:
Work Phone	Work Phone
Relationship to Student: Parent(s)	Relationship to Student:
Primary Language: English	Primary Language

Special Education Information

Date of Initial Eligibility Meeting: 08/25/02 (month/day/year)

Date of Last IEP Review: 05/10/06 (month/day/year)

Date of Next Eligibility Meeting: 05/20/08 (month/day/year)

Date of Next Annual Review: 05/10/08 (month/day/year)

Reason for Meeting: Initial_____ Annual_____ *Reevaluation (Triennial)_____ Other X

* Required for change in disability, significant change in placement, or exit from special education program

Primary Disability: Physical Disability / Autism

Setting Code: 302 (L.M.41)

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EXHIBIT 1

Douglas County School District Re.1 - Instructional Support Services
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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 10/31/07

Participants in Meeting

Initials indicate participation only.

The following participants must be in attendance:
(please print name and initial if you are in attendance at the meeting.)

Jennifer [redacted]	
Student's Parent/Surrogate Parent *(unless parent decided not to attend)*	Student's Parent *(unless parent decided not to attend)*
Amy Holton	Ashley Grams AG
Special Education Director/Designee	Special Ed. Teacher / S/L Pathologist
Pam Deyoung	
General Education Teacher *(if the student is or may be participating in the general education environment)*	Student *(when appropriate)*
Karen Barker	
Building Principal / Designee *(for eligibility only)*	Interpreter *(when appropriate)*

Others with knowledge and expertise regarding this student:

Ranae Peppas	
Speech / Language Pathologist	School Nurse
Denise Alford	
Occupational Therapist	Physical Therapist
School Psychologist	School Social Worker
Audiologist	School Counselor
Other *(specify area represented)*	Other *(specify area represented)*
Non-Attendee	Non-Attendee
Non-Attendee	Non-Attendee

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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student [redacted] Endrew Robert LASID 122955 SASID 122955
School of Attendance: Heritage Elementary Date of Meeting: 10/31/07

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

Educational

Evaluations Administered/Date and/or Information Reviewed *Include classroom observation other than classroom teacher*	Name of Evaluator	Date
	Ashley Grams	*05/17/06*

Observations:
Needs verbal prompts to answer comprehension questions
Knows basic addition facts up to 12
Working on subtraction
Drew is very distractable in many environments.

Present Level of Educational and Functional Performance
How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

Drew spends most of his day in the general education class. He is very capable of learning However Drew is very distractable. He benefits more in a quiet one-on-one structured environment. Drew is able to follow the classroom routine with one verbal prompt from a friend or teacher. Drew does not interact with his peers independently. He needs a verbal prompts for greetings □ It is difficult for him to make any kind of eye contact and to respond to peer□s' questions.
Although Drew needs support to decode unfamiliar words and new strategies to help retell a story, reading is one of his strengths.
Drew continues to need help to write a sentence independently. He needs several prompts to verbally say one complete sentence He can copy a sentence verbatim
Drew has demonstrated significant growth in math computation. He can add numbers up to 14 and is now working on subtraction Drew has been introduced to money but is inconsistent identifying and stating the values of the coins

☐ Not a current area of concern due to existing information (If appropriate, please check)

Educational Needs
Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?

Improve literacy skills such as decoding and comprehension
Continue to improve math computation skills and basic number sense
Improve writing process
Sensory breaks

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Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 10/31/07

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

Communication

Evaluations Administered/Date and/or Information Reviewed — Name of Evaluator — Date
Language of evaluation if other than English — *Renae Pappas, M.S.CCC-SLP* — *05/10/07*

Assessment results obtained by Nancy Lee Burdic in May, 2005
Peabody Picture Vocabulary Test-III (PPVT-III) SS=70 %ile=2
Speech-language sample: Drew primarily uses language to make requests ("computer closed?") and comments. He will say hello to adults consistently when prompted and occasionally at a spontaneous level. Drew rehearses information he's heard in class during individual work time and, per parental report, at home. Drew will point to and name items in the classroom.

Communication Rating: V = 0 F = 0 A = 2 L = 4 Total CRS = 4 OR FC = 4

Comment:

Present Level of Educational and Functional Performance
How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

Nancy Burdic 5/05 Drew has demonstrated strong growth in specific receptive and expressive language skills. What continues to be challenging for him is the generalization of these skills to enhance communication while in school. He is showing greater interest in connecting with his friends and teachers, but the types of interactions remain limited. In the classroom environment, he is most successful at requesting and making comments about what is of interest to him. This can often result in verbal perseverations, which have great meaning to Drew, but are often not contextually relevant. Drew appears anxious during these times, demonstrating heightened movement, rigid responses to attempts at re-direction, emotional outbursts, and increased tension. This strong focus on specific items/events appears to prevent him from processing what is going on in the classroom, interacting meaningfully with his peers without facilitation, and actually exchanging information with communication partners.

Renae Pappas 5/07 Many of the same observations remain today. Drew has limited interactions with peers. When prompted to greet others, he rarely will make eye contact but will utter "Hi" and sometimes will state the name of the person. Drew makes requests and statements that are significant to him. An example is the timer. He perseverates on looking at a timer or pushing the buttons of the timer (he knows where they are throughout the school). His anxiety increases and he verbally perseverates until he can see or touch the timer. Meaningful interactions with others are limited because of his narrow focus.

Drew attends a daily literacy group 5 times a week for 30 minutes each. He will engage in reading outloud and answering simple questions. He will also complete written assignments with prompting.

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Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

continued

A language sample revealed that Drew uses short utterances consisting of 2 to 4 words per utterance. For example: " The bird. Don't bird. Didn't listen. He did bird out. The bird flew away."

☐ Not a current area of concern due to existing information (If appropriate, please check)

Communicative Needs:

Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?

--increase contextually relevant verbal interactions
--increase variety of communication acts, such as expressing frustrations
--improve eye contact

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School of Attendance: Heritage Elementary Date of Meeting: 10/31/07

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

Pertinent Family Information

Evaluations Administered/Date and/or Information Reviewed *Include adaptive behavior for student with suspected SLIC disability*	Name of Evaluator	Date
	Theresa O'Hearn Gay, LCSW	*05/20/05*

Home visit with Mrs. [redacted] record review, team consultation
Drew has been attending preschool at the Rock Canyon site 4 days/wk and enjoys going to school. This is Drew's third year with the preschool program Mrs [redacted] continues to be pleased with Drew's developmental progress. He is typically using 3 word phrases (and some 4 word phrases) to convey his needs/wants (e g., "mommy, sit down"). Drew's mom feels the ideas that he is able to verbalize have expanded and become more complex. He is also doing more verbal commenting during his play. In the area of language, the [redacted] top current priority is Drew's articulation errors which increase when he is excited and talking rapidly Drew seems to be more receptive to interactions with peers and now his family would like to see him using his language in these social interactions Drew continues to enjoy and do well with gross motor activities and has less interest in the fine motor activity of writing. Drew is able to write his name and draw some simple shapes; his mom remains concerned about his tool grip Drew continues to participate in private treatment that includes 9 hrs/wk of home training and 3 hrs/wk of an integrated play group with Annette Nunez. Since 10/04 Drew has been taking Ritalin and his mom feels it has decreased his impulsivity and improved his body control The Vineland Adaptive Behavior Scales was completed with Mrs [redacted] to assess Drew's adaptive skills and yielded the following results.

DOMAIN	*STANDARD SCORE*
PERCENTILE RANK	*ADAPTIVE LEVEL*
Communication	*72*
3	*Mod. Low*
Daily Living Skills	*64*
1	*Low*
Socialization	*68*
2	*Low*
Motor Skills	*84*
14	*Mod. Low*
Overall Composite	*66*
1	*Low*

Drew's overall adaptive skills are at the 1st percentile when compared to peers which is consistent with a diagnosis of Autism Spectrum Disorder Mrs. [redacted] has noticed some increased rigidity from Drew recently around having to take the same route to school and get out of the car on a specific side and hopes he can gain some more flexibility Mrs [redacted] is eager to learn more details about Drew's transition to kindergarten including what steps can be taken to increase Drew's success in his process and what

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Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

continued

schedule will be utilized to help him with the routine in the new setting. The [redacted] have been terrific advocates for Drew's educational needs and proactive in utilizing school, private and community resources to support Drew's progress

Present Level of Educational and Functional Performance

How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

Mrs. [redacted] feels Drew's limited communication and social skills will continue to require adult support in order for him to maximize learning and participation in the classroom setting. The family greatly values frequent communication between school and home to support Drew's progress.

☐ Not a current area of concern due to existing information (If appropriate, please check)

Needs:

Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?

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Social/Emotional

Evaluations Administered/Date and/or Information Reviewed *Include adaptive behavior for student with suspected SLIC disability.*	Name of Evaluator	Date
	Julie Steffen, M.A. ECSE	*05/15/05*

Drew has made steady progress in this area. He transitions into class easily He will occasionally greet peers using their name however, often without purposeful intention. Drew seems to enjoy taking turns with his friends and will at times request a turn or offer a turn independently. This seems to depend on the toy he is playing with and his motivation for the toy. During play, Drew continually requires prompting to stay focused and attentive His play is mainly single step play and can be perseverative at times He is able to link 2-3 steps in play when the motivation is high. Drew attends and enjoys an integrative play group several times per week and progress has been reported. Drew enjoys recess time however needs a visual schedule to explore other playground equipment He prefers to stay in the playhouse and will interact with others if they are inside the house with him.

Present Level of Educational and Functional Performance
How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

Drew's desire and interest for social interactions has increased. He derives pleasure from his peers. Drew continues to demonstrates a high level of distractibility and perseverative behavior which interfere with his play and communication in an integrated setting. Drew gets "stuck" on certain toys and materials (currently the timer and the frog jack-in-the-box)and it is very difficult for him to be re-directed This behavior has increased over the last several months In an attempt to increase attention, reduce anxiety, increase play and social interactions, and increase generalization of academic skills the following strategies have been used:
visual organization system (drawer system), many variations of a visual picture schedule (name card, directional words, and center name disc to transition), re-direction, reinforcement systems, over-correction, physical boundaries to keep desired toys out of sight, TEACCH work system, preferential seating during large group, systematically scheduling time to play with desired toys, head phones and visor/hat to reduce auditory and visual distractions, and behavior momentum phrases as a re-direction These teaching strategies have been used systematically however Drew's verbal perseverations continue to exist. It is felt that his desire for these toys and materials seems out of his control and he appears to exhibit anxious behavior (increase in perseverative phrases, increased fidgeting or activity level, decrease in focus, and an increase in emotional outbursts) when he cannot play with the toys or when he is asked to complete his work first. Drew has been taking Ritalin since 10/04 which initially seemed to help with focus and attention. Recently the previous effect has not been observed in the school environment Currently Drew's emotional state affects his ability

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continued

to work and interact with his peers. When his anxiety is down we see more focus and purposeful behavior in the classroom.

☐ Not a current area of concern due to existing information (If appropriate, please check)

Social/Emotional Needs:

Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?

Improve attending skills to increase task completion and independence
Decrease anxiety
Increase complexity of play and appropriate use of materials during play
Increase reciprocal peer interactions and length of social exchanges

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Cognitive

Evaluations Administered/Date and/or Information Reviewed *Include adaptive behavior for student with suspected SLD disability.*	Name of Evaluator	Date
	Cathy Jungen, Ed.S	05/05/05

*Classroom observation, review of records, update of information from teacher, Kaufman Brief Intelligence Test (K*BIT).*

In February of 2004, Drew's cognitive development was evaluated at the request of his mother and pediatrician (please see separate report) At that time, the Differential Ability Scale (DAS) was attempted but only partially successful In the classroom, Drew's behavior and attention was nicely developed for familiar tasks and his behavior during testing was atypical for him, but indicative of being taken out of his routine and presented with novel tasks Drew participated with the verbal items but his attention and behavior prevented completion of the nonverbal items. Verbally on the DAS, Drew's concept knowledge (Naming Vocabulary T = 33) was significantly stronger than his understanding of more abstract verbal information (Verbal Comprehension T=24) and his overall verbal thinking skills were significantly delayed for his age (Verbal SS = 64) Understanding relationships in pictures was challenging for Drew as well (Picture Similarities T=24). Drew's direct matching skills were strong but matching based on similarities or simple categories was a challenge for him. The Developmental Observation Checklist System (DOCS) was completed by Drew's teachers to determine the validity of the DAS Drew's cognitive development, as reported by his teachers responses on the DOCS, continued to show a pattern of significant delay (SS=64) that was consistent with the DAS and approximated the 23 month age level. Although his scores were more indicative of a 2 year old, Drew's teachers felt that with facilitation and a familiar routine, his functioning in the classroom was more like a new 3 year old.

*Currently, Drew is functioning within the Below Average range of intelligence at the 8th percentile (SS=79) on the K*BIT His true score should fall within the range of 69-89 with 95% accuracy. This is somewhat improved from his performance last year on the DAS and the DOCS, which may be attributed to his being on Ritalin. Drew's vocabulary knowledge was Below Average (SS=75), as were his nonverbal reasoning skills (SS=87) Although on Ritalin, Drew was extremely distractible during this assessment, which negatively impacted his performance He appeared stressed to be out of his class and routine, often looking into the class and repeating whatever was being said in class. Even given his distraction, this appears to be a fairly accurate estimate of Drew's current level of thinking based on his classroom performance and teacher report.*

Present Level of Educational and Functional Performance

How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

Drew's thinking skills are impacted by his language delays and attention He

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continued

learns and performs best within a structured and familiar routine given visual cues. Generalizing his skills to different settings continues to be challenging for him.

☐ Not a current area of concern due to existing information (If appropriate, please check)

Cognitive Needs:

Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?

*Improve attention and verbal thinking.

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Current Health Evaluation - Nurse

Evaluations Administered/Date and/or Information Reviewed — Name of Evaluator — Date

include classroom observation other than classroom teacher

Present Level of Educational and Functional Performance

How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

☐ Not a current area of concern due to existing information (If appropriate, please check)

Health Needs:

Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?

- Results of vision screening. _____
- Results of hearing screening: _____
- Health care plan? no
- How does it relate to the suspected disability? _____

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Physical Motor/Other Health Related

Evaluations Administered/Date and/or Information Reviewed *Include classroom observation other than classroom teacher.*	Name of Evaluator	Date
	Denise O Alford MS, OTR	*05/10/07*

Within the past year Drew has made continued to progress with his motor skills He is right hand dominant and holds the pencil with a functional grasp. Pencil pressure is typically appropriate. He is able to write all of the letters without a model, but legibility is diminished form when he copies the letters. Drew's best writing is when he can copy a model that is on his writing surface and the letter size is designated for him with a highlighter or pen Consistency can be variable depending on his focus at the time. Drew continues to struggle with drawing when he doesn't have a model. He benefits from models that break the picture down into smaller parts. When cutting a simple geometric figure of 3 inches or larger, he is able to cut within ° inch of the line when he slows down. Manipulating the paper with his left hand is the most difficult part of the task for him Drew's focus and rate of speed, fast, for all paper pencil tasks and cutting activities negatively impacts his performance. Modulating his speed during tasks is difficult.

Sensory Profile-a questionnaire that determines how a child processes sensory information This was completed by Jennifer [redacted] April 26, 2007

SENSORY PROCESSING	
Auditory Processing	*Probable Difference*
Visual Processing	*Typical Performance*
Vestibular Processing	*Definite Difference*
Touch Processing	*Definite Difference*
Multisensory Processing	*Definite Difference*
Oral Sensory Processing	*Typical Performance*
MODULATION	
Sensory Processing Related to Endurance /Tone	*Probable Difference*
Modulation Related to Body Position and Movement	*Definite Difference*
Modulation of Movement Affecting Activity Level	*Probable Difference*
Modulation of Sensory Input Affecting Emotional Responses	*Definite*
Modulation of Visual Input affecting Emotional Responses and Activity Level	*Probable Difference*
BEHAVIOR AND EMOTIONAL RESPONSES	
Emotional/Social responses	*Definite Difference*
Behavioral Outcomes of Sensory Processing	*Definite Difference*
Items Indicating Thresholds for Responses	*Definite Difference*

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The Sensory Profile can be broken down by factors that are influenced by sensory integration

Sensory Seeking	*Definite Difference*
Emotionally Reactive	*Definite Difference*
Low Endurance/Tone	*Probable Difference*
Oral Sensory Sensitivity	*Typical Performance*
Inattention/Distractibility	*Definite Difference*
Poor registration	*Definite Difference*
Sensory Sensitivity	*Typical Performance*
Sedentary	*Typical Performance*
Fine Motor/Perceptual	*Probable Difference*

Many sensory strategies have been utilized with Drew throughout the year, which help him to remain on task and to calm down when he seems hyper. During certain activities he sits on a ball for stimulation but for paper pencil tasks he has a weighted lap pad. He also carries the weighted pillow around his neck. Deep pressure is important to him for organizing himself, this is done through a variety of ways the weighted pillow, laying between a mats, joint compressions, and pressure on his shoulders. Music can be alerting and or calming depending on the specific song. Chewing is also calming

Present Level of Educational and Functional Performance

How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

Providing structure improves Drew's performance in his motor activities. Attention to task impacts his ability to perform at his highest level. Drew benefits from sensory activities to help him organize himself internally

☐ Not a current area of concern due to existing information (If appropriate, please check)

Physical Motor/Other Health Related Needs

Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?

Drew needs to improve his motor performance as related to academics

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Determination of Eligibility and Disability

(This section completed only for eligibility meetings)

Have sufficient and appropriate evaluations been completed, documented, or considered to determine the presence of an educational disability? ☒ Yes ☐ No

If not, obtain additional information and reconvene the meeting

(This section completed only for eligibility meetings.)

Does the student have a disability as defined in the State Rules for the Administration of the Exceptional Children's Education Act? *(complete and attach appropriate checklist)* ☒ Yes ☐ No

If no, terminate the meeting

(This section completed for all meetings.)
If the student has a disability, the disability is
(If more than one disability is determined, the primary disability should be identified with a 1, the secondary disability with a 2

- ☐ 01 Significant Limited Intellectual Capacity
- ☐ 03 Significant Identifiable Emotional Disability
- ☐ 04 Specific Learning Disability
- ☐ 05 Hearing Disability *(requires communication plan)*
- ☐ 06 Vision Disability *(requires literacy plan)*
- ☐ 08 Speech or Language Impairment
- ☐ 11 Preschool Child with a Disability

Physical Disability

- ☐ 14 Traumatic Brain Injury
- [1] 13 Autism
- ☐ 07 Other Physical Disability
  - ☐ Check if physical disability due to ADD/ADHD

Multiple Disabilities

- ☐ 09 Deaf-Blind
- ☐ 10 Multiple Disabilities with Cognitive Impairment

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Academic/Functional Goals and Objectives

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the extent of nondisabled children.

Annual Goal: *1. The student will demonstrate basic language and communication skills in order to access the general education curriculum as measured by the following objectives:*

Standard/ Access Skill: *Communication and Basic Language Skills*

Short-term Objective: *a) Drew will express desires("I want ....") and emotions ("I am mad.") with words when prompted*
Start: 05/10/07
End: 05/09/08

Checkpoint:

Criteria: *>= 5 occurrence in multiple environment(s)*

Narrative:

Baseline: *<= 5 occurrence in multiple environment(s)*

Narrative: *Drew does not verbalize consistently when he wants something or is frustrated or upset.*

Methods(s) of Measurement:

Progress Reporting

Period End: **Level:** **Status:**
Comments:

Period End: *11/12/07* **Level:** *3* **Status:** *Will be continued (C).*
Comments: *Drew has made significant improvement in his spontaneous speech. Great job Drew!*

Short-term Objective: *b) Drew will make eye contact with peers and teachers with minimal prompting.*
Start: 05/10/07
End: 05/09/08

Checkpoint:

Criteria: *>= 5 occurrence in a time period of <= 1 week(s) in multiple environment(s)*

Narrative:

Baseline: *<= 5 occurrence in a time period of >= 1 week(s)*

Narrative: *It is difficult for Drew to make and maintain eye contact with others*

Progress Key:
1. Skill / behavior is rarely or never demonstrated, therefore incomplete positive data is available.
2. Skill / behavior is inconsistent with frequent prompts and is below expectations of plan.
3. Skill / behavior is consistent over time with few prompts and meets expectations of plan.
4. Skill / behavior is generalized and transferred without prompts and is above expectations of plan.

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Academic/Functional Goals and Objectives (con't)

Methods(s) of Measurement:

Progress Reporting

Period End: Level: Status:
Comments:

Period End: 11/09/07 Level: 3 Status: Will be continued (C)
Comments: Eye contact remains inconsistent but improving.

Short-term Objective: c) Drew will expand his utterances by using longer, more grammatically complex sentences or questions
Start: 05/10/07
End: 05/10/08

Checkpoint:

Criteria: >= 4 words with <= 1 verbal prompts

Narrative: Drew could model after a given sentence or spontaneously produce a sentence with 4 words or more.

Baseline: <= 4 words with >= 1 verbal prompts

Narrative: Drew currently uses sentences that are 2 to 4 words in length.

Methods(s) of Measurement:

Progress Reporting

Period End: Level: Status:
Comments:

Period End: 11/09/07 Level: 3 Status: Will be continued (C).
Comments: Drew's utterances are longer and more complex.

Short-term Objective: d) When in need of working materials (i.e., pencil or paper), Drew will ask his peers or teachers for necessary items
Start: 05/10/07
End: 05/10/08

Checkpoint:

Criteria: >= 3 occurrence in a time period of >= 1 day(s) with <= 1 verbal prompts

Narrative:

Baseline: <= 3 occurrence in a time period of >= 1 day(s) with >= 2 verbal prompts

Narrative:

Methods(s) of Measurement:

Progress Reporting

Period End: Level: Status:
Comments:

Period End: 11/09/07 Level: 3 Status: Will be continued (C).
Comments: Drew needs to be prompted with this goal. We will continue to work towards this goal.

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Legal Name of Student: [redacted] Andrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 10/31/07

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the extent of nondisabled children.

Annual Goal: 2. The student will Demonstrate the ability to read and comprehend a variety of instructional-leveled texts, as measured by the following objectives.

Standard/ Access Skill: Language Arts, 4

Short-term Objective: a) Using Story Grammar Marker Drew will be able to identify the beginning, middle, and end of a story. Start: 05/10/07 End: 05/10/08

Checkpoint: K - 3 (4.1): Uses a variety of strategies (e.g., context clues, picture clues, phonic cues, word substitutions) to recognize and comprehend words in text.

Criteria: >= 4 successes, over the course of 1 week(s)

Narrative:

Baseline: "0) Does not participate"

Narrative:

Methods(s) of Measurement: Demonstration/Performance.

Progress Reporting

Period End:		Level:	Status:
Comments:			
Period End:	11/09/07	Level: 2	Status: Will be continued (C)
Comments:			

Short-term Objective: b) After reading a simple sentence Drew will answer simple WH questions using pictures/ words cards for prompts. Start: 05/10/07 End: 05/10/08

Checkpoint: K - 3 (4.1): Uses a variety of strategies (e.g., context clues, picture clues, phonic cues, word substitutions) to recognize and comprehend words in text.

Criteria: >= 4 successes, over the course of 1 week(s)

Narrative:

Baseline: "1) Participates with maximal physical assistance"

Narrative:

Methods(s) of Measurement: Demonstration/Performance.

Progress Reporting

Period End:		Level:	Status:
Comments:			
Period End:	11/09/07	Level: 3	Status: Will be continued (C).
Comments:			

Legal Name of Student: [redacted] Andrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 10/31/07

Academic/Functional Goals and Objectives (con't)

Short-term Objective: c) After reading a short story, Drew will answer a simple question about the story by writing a simple sentence. Start: 05/10/07 End: 05/10/08

Checkpoint: K - 3 (4.1): Uses a variety of strategies (e.g., context clues, picture clues, phonic cues, word substitutions) to recognize and comprehend words in text

Criteria: >= 2 successes, over the course of 1 week(s)

Narrative:

Baseline: "0) Does not participate"

Narrative:

Methods(s) of Measurement: Demonstration/Performance

Progress Reporting

Period End: Level: Status:
Comments:

Period End: 11/09/07 Level: 3 Status: Will be continued (C).
Comments:

Short-term Objective: d) Given pictures/word card for prompts Drew will predict what happens next in a story. Start: 05/10/07 End: 05/10/08

Checkpoint: K - 3 (4.1): Uses a variety of strategies (e.g., context clues, picture clues, phonic cues, word substitutions) to recognize and comprehend words in text

Criteria: >= 3 successes, over the course of 1 week(s)

Narrative:

Baseline: "0) Does not participate"

Narrative:

Methods(s) of Measurement: Demonstration/Performance.

Progress Reporting

Period End: Level: Status:
Comments:

Period End: 11/09/07 Level: 3 Status: Will be continued (C).
Comments:

Short-term Objective: e) Drew will use strategies such as tapping out sounds of words to help him decode unfamiliar words Start: 05/10/07 End: 05/10/08

Checkpoint: K - 3 (4.1): Uses a variety of strategies (e.g., context clues, picture clues, phonic cues, word substitutions) to recognize and comprehend words in text

Criteria: >= 3 successes, over the course of 1 week(s)

Narrative:

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Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 10/31/07

Academic/Functional Goals and Objectives (con't)

Baseline: "0) Does not participate"

Narrative:

Methods(s) of Measurement: Oral performance, Demonstration/Performance

Progress Reporting

Period End: Level: Status:
Comments:

Period End: 11/09/07 Level: 3 Status: Will be continued (C).
Comments:

Short-term Objective: f) After listening to a simple sentence Drew will answer simple qestions about the sentence using visual prompts
Start: 05/10/07
End: 05/10/08

Checkpoint: K - 3 (4 1)" Uses a variety of strategies (e.g., context clues, picture clues, phonic cues, word substitutions) to recognize and comprehend words in text.

Criteria: "3) Performs activity with verbal/gestural cues"

Narrative:

Baseline: "0) Does not participate"

Narrative:

Methods(s) of Measurement: Demonstration/Performance.

Progress Reporting

Period End: Level: Status:
Comments:

Period End: 11/09/07 Level: 3 Status: Will be continued (C).
Comments:

Legal Name of Student: [redacted], Andrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 10/31/07

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the extent of nondisabled children

Annual Goal: *3. The student will improve writing skills as measured by the following objectives*
Standard/ Access Skill: *Language Arts, 3*

Short-term Objective: *a) Given a detailed picture Drew will write one complete sentence describing the picture independently.* Start: *05/10/07* End: *05/10/08*
Checkpoint: *K - 3 (3 1): (Organization/Content) Organizes single-paragraph writing in a manner that develops and supports main ideas with relevent details.*
Criteria: *"3) Performs activity with verbal/gestural cues"*
Narrative:
Baseline: *"0) Does not participate"*
Narrative:
Methods(s) of Measurement: *Demonstration/Performance.*

Progress Reporting

Period End: Level: Status:
Comments:
Period End: *11/09/07* Level: *3* Status: *Will be continued (C)*
Comments: *Drew has made a lot of progress with this goal.*

Short-term Objective: *b) Drew will use correct punctuation and spacing in his writing.* Start: *05/10/07* End: *05/10/08*
Checkpoint: *K - 3 (3 1): (Organization/Content) Organizes single-paragraph writing in a manner that develops and supports main ideas with relevent details.*
Criteria: *"4) Performs activity without supports."*
Narrative:
Baseline: *"3) Performs activity with verbal/gestural cues"*
Narrative: *With verbal prompts Drew can use correct punctuation and spacing*
Methods(s) of Measurement: *Demonstration/Performance.*

Progress Reporting

Period End: Level: Status:
Comments:
Period End: *11/09/07* Level: *3* Status: *Will be continued (C).*
Comments:

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 10/31/07

Academic/Functional Goals and Objectives (con't)

Short-term Objective: c) Drew will sqeuence a three step picture and verbally say three complete sentences descring beginning, middle, and end. Start: 05/10/07 End: 05/10/08

Checkpoint: K - 3 (3.1): (Organization/Content) Organizes single-paragraph writing in a manner that develops and supports main ideas with relevant details

Criteria: "3) Performs activity with verbal/gestural cues"

Narrative: Use a model to help Drew say sentences. Verbally say a complete sentence and have Drew repeat back your sentence.

Baseline: "0) Does not perficipate"

Narrative:

Methods(s) of Measurement: Oral performance, Demonstration/Performance.

Progress Reporting

Period End: Level: Status:
Comments:

Period End: 11/09/07 Level: 3 Status: Will be continued (C).
Comments:

Legal Name of Student [redacted] Andrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 10/31/07

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the extent of nondisabled children.

Annual Goal: *4. The student will communicate an understanding of number sense as measured by the following objectives:*

Standard/ Access Skill: *Mathematics, 1*

Short-term Objective: *a) Given subtraction problems using numbers 1-12 Drew will use manipulatives to accurately solve the problem.* Start: 05/10/07 End: 05/10/08

Checkpoint: *K - 3 (1.3). Understands basic mathematical properties (e g., 2 + 3 = 3 + 2, n + 0 = n, 3 x 0 = 0, 3 x 1 = 3) and how they apply to whole numbers.*

Criteria: *>= 4 successes, over the course of 1 week(s)*

Narrative:

Baseline: *"1) Participates with maximal physical assistance"*

Narrative:

Methods(s) of Measurement: *Demonstration/Performance.*

Progress Reporting

Period End: Level: Status:
Comments:

Period End: *11/09/07* Level: *3* Status: *Will be continued (C)*
Comments:

Short-term Objective: *b) Given additon problems Drew will deomonstrate adding whole numbers with regrouping with sums to 20* Start: 05/10/07 End: 05/10/08

Checkpoint: *K - 3 (1.2): Understands the characteristics (e g , even/odd numbers) of and relationships (e g., ordering, comparing, determining equivalency) between and among whole numbers*

Criteria: *>= 3 successes, over the course of 1 week(s)*

Narrative:

Baseline: *"0) Does not participate"*

Narrative:

Methods(s) of Measurement: *Demonstration/Performance*

Progress Reporting

Period End: Level: Status:
Comments:

Period End: *11/09/07* Level: *3* Status: *Will be continued (C)*
Comments:

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 10/31/07

Academic/Functional Goals and Objectives (con't)

Short-term Objective: c) Drew will identify and state the value of coins
Start: 05/10/07 End: 05/10/08

Checkpoint: K - 3 (1.2). Understands the characteristics (e.g., even/odd numbers) of and relationships (e.g., ordering, comparing, determining equivalency) between and among whole numbers
Criteria: >= 4 successes, over the course of 1 week(s)

Narrative:

Baseline: "3) Performs activity with verbal/gestural cues"

Narrative:

Methods(s) of Measurement: Demonstration/Performance.

Progress Reporting

Period End: **Level:** **Status:**
Comments:

Period End: 11/09/07 **Level:** 3 **Status:** Will be continued (C).
Comments:

Short-term Objective: d) Given coins Drew will accurately count to one dollar.
Start: 05/10/07 End: 05/10/08

Checkpoint: K - 3 (1.1). Understands place value as it relates to whole numbers, 0 □ 9,999
Criteria: >= 3 successes, over the course of 1 week(s)

Narrative:

Baseline: "0) Does not participate"

Narrative:

Methods(s) of Measurement: Demonstration/Performance

Progress Reporting

Period End: **Level:** **Status:**
Comments:

Period End: 11/09/07 **Level:** 3 **Status:** Will be continued (C).
Comments:

Legal Name of Student: [redacted] Andrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 10/31/07

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the extent of nondisabled children

Annual Goal: 5. The student will improve his motor skills as related to academics as measured by the following objectives:
Standard/ Access Skill: Physical

Short-term Objective: a) Given the opportunity, Drew will cut out a square or circle of 1 inch or smaller accurately, with errors of no more than 1/4 inch
Start: 05/17/06 End: 05/17/07

Checkpoint:
Criteria: >= 95 percent in 4 out of 5 consecutive trials, over the course of 0 day(s)
Narrative:
Baseline: <= 80 percent
Narrative: Able to cut out objects of 3 inches or larger with 1/4 inch accuracy
Methods(s) of Measurement: Demonstration/Performance.

Progress Reporting

Period End:	Level:	Status:
Comments:		
Period End: 11/09/07	Level: 3	Status:
Comments:		

Short-term Objective: b) Given a classroom assignment, Drew will write short answers with correct letter size when using 3 lined paper
Start: 05/10/07 End: 05/10/08

Checkpoint:
Criteria: >= 80 percent in 4 out of 5 consecutive trials
Narrative:
Baseline: <= 40 percent
Narrative:
Methods(s) of Measurement: Written performance.

Progress Reporting

Period End:	Level:	Status:
Comments:		
Period End: 11/09/07	Level: 3	Status:
Comments: Needs lots of verbal or physical prompting		

Short-term Objective: c) Given a classroom assignment of 1 sentences, Drew will write with correct bottom line orientation for letters
Start: 05/10/07 End: 05/10/08

Legal Name of Student: [redacted], Andrew Robert LASID 122955 SASID. 122955
School of Attendance: Heritage Elementary Date of Meeting: 10/31/07

Academic/Functional Goals and Objectives (con't)

Checkpoint:
Criteria: >= 80 percent in 4 out of 5 consecutive trials

Narrative:

Baseline: <= 40 percent

Narrative:

Methods(s) of Measurement: Written performance

Progress Reporting

Period End:	Level:	Status:
Comments:		
Period End: 11/09/07	Level: 3	Status:
Comments:		

Short-term Objective: d) Given the opportunity to color a picture, Drew will use at least 5 colors and be within 1/8 inch of the line
Start: 05/10/07
End: 05/10/08

Checkpoint:
Criteria: >= 90 percent in 4 out of 5 consecutive trials

Narrative:

Baseline: <= 50 percent

Narrative:

Methods(s) of Measurement: Demonstration/Performance.

Progress Reporting

Period End:	Level:	Status:
Comments:		
Period End: 11/09/07	Level: 3	Status: Will be continued (C).
Comments: Prior to starting a project if told how many colors to use, he will pick them out and use them all.		

Legal Name of Student [redacted] Andrew Robert LASID. 122955 SASID. 122955
School of Attendance. Heritage Elementary Date of Meeting: 10/31/07

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the extent of nondisabled children.

Annual Goal: *6. The student will improve social skills as measured by the following objectives:*
Standard/ Access Skill: *Self-Advocacy / Self-Determination*

Short-term Objective: *a) Drew will learn his classmates' names* Start: 05/10/07 End: 05/10/08
Checkpoint:
Criteria: *>= 80 percent in multiple environment(s)*
Narrative:
Baseline: *"0) Does not participate"*
Narrative:
Methods(s) of Measurement: *data collection.*

Progress Reporting

Period End: Comments:	Level:	Status:
Period End: 11/09/07 Comments:	Level: 3	Status: Will be continued (C).

Short-term Objective: *b) Drew will respond to a greeting by saying hi or hello and then the person□s name independently* Start: 05/10/07 End: 05/10/08
Checkpoint:
Criteria: *>= 90 percent in multiple environment(s)*
Narrative:
Baseline: *"3) Performs activity with verbal/gestural cues"*
Narrative:
Methods(s) of Measurement: *data collection*

Progress Reporting

Period End: Comments:	Level:	Status:
Period End: 11/09/07 Comments: *Doing much better at this goal*	Level: 3	Status: Will be continued (C).

Short-term Objective: *c) Drew will respond to a question with an answer and will ask a reciprocal question* Start: 05/10/08 End: 05/10/08

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Legal Name of Student: [redacted] Andrew Robert LASID 122955 SASID 122955
School of Attendance: Heritage Elementary Date of Meeting. 10/31/07

Academic/Functional Goals and Objectives (con't)

Checkpoint:
Criteria: >= 80 percent with <= 1 verbal prompts in multiple environment(s)

Narrative: Drew will answer a question such as how are you? I'm ok then he will ask how are you in return.

Baseline: "0) Does not participate"

Narrative:

Methods(s) of Measurement: data collection

Progress Reporting

Period End: Level: Status:
Comments:
Period End: 11/09/07 Level: 3 Status: Will be continued (C).
Comments:

Short-term Objective: d) Drew will interact with peers on the playground by asking a friend to play
Start: 05/10/08
End: 05/10/08

Checkpoint:
Criteria: >= 3 successes, over the course of 1 week(s) with <= 1 verbal prompts

Narrative:

Baseline: "0) Does not participate"

Narrative:

Methods(s) of Measurement:

Progress Reporting

Period End: Level: Status:
Comments:
Period End: 11/09/07 Level: 3 Status: Will be continued (C).
Comments:

Short-term Objective: e) Drew will answer recall questions.
Start: 05/10/07
End: 05/10/08

Checkpoint:
Criteria: "3) Performs activity with verbal/gestural cues"

Narrative: Drew will answer questions such as What did you have for breakfast? Who read the story this morning? Where did you go after lunch?

Baseline: "0) Does not participate"

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Legal Name of Student. [redacted] Andrew Robert LASID. 122955 SASID. 122955
School of Attendance: Heritage Elementary Date of Meeting. 10/31/07

Academic/Functional Goals and Objectives (con't)

Narrative:

Methods(s) of Measurement: Oral performance, Demonstration/Performance

Progress Reporting

Period End: Level: Status:
Comments:

Period End: 11/09/07 Level: 3 Status: Will be continued (C)
Comments:

Douglas County School District Re.1 - Instructional Support Services
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0080

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student [redacted], Andrew Robert LASID: 122955 SASID 122955
School of Attendance: Heritage Elementary Date of Meeting: 10/31/07

Special Education, Related Services & Supplementary Aids/Services

Accommodations / Modifications:

Describe the unique accommodations/modifications necessary for the student to participate in the general education curriculum, as well as, nonacademic and extra curricular activities considering the identified needs of the student.

Visual schedule as needed, visual work system, preferential seating, movement and sensory breaks as needed, Sensory strategies including deep pressure, weighted lap pillow, heavy work, facilitate social exchanges with peers, sytematic instructional techniques. Use sensory strategies to optimize attention and arousal. Shortened assignments with visual support. Provide a specific time-out spot for Drew to calm when responding to anxiety provoking event

Service Delivery:

Specific services needed to address goals and objectives:
special education teacher, speech/language therapy, occupational therapy, Mental Health and paraprofessional support.

Special Education Services:

	Service Coordinator	#2	#3	#4	#5
Type of service provider (assignment)	SSW/Cam	OT staff	MH	SL	
Projected beginning date of service	05/10/07	05/10/07	05/10/07	05/10/07	
Projected ending date of service	05/10/08	05/10/08	05/10/08	05/10/08	
	Hours of Special Education Services per Week by Service Provider				
Indirect (consultation)	1	0.25	0.25	0.5	
Integrated services in general classroom	25				
Direct outside general classroom	7.5	0.5	0.5	1	
Total hours by provider	33.5	0.75	0.75	1.5	

Note: Level Matriculation info provided on Comments page.

Other IEP Services:
(such as supplementary aids and services)

	Description	Hrs per week
Parent Follow-up Activities		
Preschool Integrated Education Program		

Does the student require:

Special transportation?	☒ Yes	☐ No
A literacy/modality plan? (For Vision Disability)	☐ Yes	☒ No
A communication plan? (For Hearing Disability)	☐ Yes	☒ No
A behavior plan?	☒ Yes	☐ No
A health care plan?	☐ Yes	☒ No
Assistive technology? (If yes, describe).	☐ Yes	☒ No

Extended School Year? ☒ Yes ☐ No ☐ To be determined by: _____
(Rationale for decision)
Autism Spectrum Disorder--predicted regression after long breaks. Parents declined to ESY.

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Douglas County School District Re.1 - Instructional Support Services
620 Wilcox St, Castle Rock, CO 80104
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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted], Andrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 10/31/07

Comments

1 05/31/05 Steffen, Julie - Level Matriculation Summary
Meeting Date: 05/20/05
Specific Services: SSN team, speech-language therapy, OT

	Service Coordinator	#2	#3	#4	#5
Type of service provider (assignment)	ssn/slp/pa	OT/para			
Projected beginning date of service	08/15/05	08/15/05			
Projected ending date of service	05/20/06	05/20/06			

	Hours of Special Education Services per Week by Service Provider				
Indirect (consultation)		0.25			
Integrated services in general classroom	9.25	0.50			
Direct outside general classroom	2.0				
Total hours by provider	11.25	0.75	0	0	0

Accommodations: visual schedule as needed, visual work system, preferential seating, sensory strategies, mini-schedule for playground, provide wait time for responding, peer training, slantboard for writing, reminders to use the potty, wheat free nut free diet, social stories to teach new routines, modify curriculum
Setting Code 41 Home School/General Classroom with Support/<21%
Participants in Meeting: Jennifer [redacted], Annette Nunez, Julie Steffen, Christine Sibona, Christy Lilley, Nancy Burdic, Kim Cline, Mrs. MacIntosh, Denise Alford, Melissa Bishop

2. 10/31/07 Grams, Ashley - 10/31/07 Upon reviewing Drew's IEP the team found it necessary to change Drew's service hours. The team feels he will benefit from intense individual instruction in the SSN room.

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Douglas County School District Re 1 - Instructional Support Services
620 Wilcox St, Castle Rock, CO 80104
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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted], Andrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 10/31/07

Special Education, Related Services & Supplementary Aides/Services

Recommended Placement in Least Restrictive Environment (LRE):

How much time is student only with students with disabilities? <21%

Setting Code: 302 Inside the Regular Class 40% to 79% of the Time

Why? structured drill and practice needed to apply in the general classroom

Involvement of Student in State and District Assessments:

(a) What state and district assessments of student achievement will the student be taking?

☐ CSAP ☐ CSAP-A ☐ Other _____

(b) What accommodations, if any, will be provided to the student related to the administration of the assessments of student achievement?

small group/ one on one instructionsimplify verbal direction as allowed per test designwritten directions/picture cues as allowed

(c) If the student will not participate in said assessments, why not?

(d) How will the student be assessed?

Douglas County School District Re.1 - Instructional Support Services
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0080

Legal Name of Child/Student: [redacted] *Andrew Robert* Date of Meeting 10/31/07
Birthdate [redacted] C.A. [redacted] LASID. 122955 SASID 122955

Determination of Disability

DEFINITION: A child with a physical disability shall have a sustained *illness or disabling physical condition* which prevents the child from receiving reasonable educational benefit from general education

A sustained illness means a prolonged, abnormal condition requiring continued monitoring characterized by limited strength, vitality, or alertness due to chronic or acute health problems and a disabling condition means a severe physical impairment. Conditions such as, but not limited to, traumatic brain injury, autism, attention deficit disorder and cerebral palsy may qualify as a physical disability, if they prevent a child from receiving reasonable educational benefit from general education

Criteria for a physical disability preventing the child from receiving reasonable educational benefit from general education should be dependent upon the child's diagnosis and degree of involvement in the regular school setting as characterized by any of the following:

The child's chronic health problem or sustained illness requires *(check those that apply)*

- ☐ continual monitoring,
- ☐ intervention, and/or
- ☐ specialized programming

in order to accommodate the effects of the illness so as to reasonably benefit from the educational program.

The child's physical disability interferes with *(check those that apply)*

- ☐ ambulation,
- ☒ attention,
- ☐ hand movements,
- ☒ coordination,
- ☒ communication,
- ☒ *self-help skills, and*
- ☒ other activities of daily living

to such a degree that it requires: *(check those that apply)*

- ☒ special services,
- ☐ *equipment, and/or*
- ☐ transportation.

REQUIRED FOR DETERMINATION OF A PHYSICAL DISABILITY.

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Form F.8

Douglas County School District Re 1 - Instructional Support Services
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0080

Legal Name of Child/Student: [redacted] *Endrew Robert* Date of Meeting: *10/31/07*
Birthdate: [redacted] C.A.: [redacted] LASID: *122955* SASID: *122955*

INDIVIDUAL LITERACY PLAN / COLORADO BASIC LITERACY ACT SUGGESTED PARENT/FAMILY INTERVENTIONS

The following suggested checklist of parent/family literacy interventions are not required by Special Education law, but are based upon Colorado Basic Literacy Act (CBLA) requirements.

Elementary School Level

Primary Level: Parent provides support outside the school day.

- ☐ Read to the child each day.
- ■ Read with the child each day
- ■ Talk with the child about what they are reading and/or watching
- ■ Encourage child to use reading for a variety of reasons (recipes, lists, etc.).
- ■ Write for a variety of reasons (cards, letters, journals, etc.)
- ☐ Practice alphabet letter identification and letter sounds with the child
- ■ Practice reading high frequency word cards with the child
- ☐ Monitor the child's homework.
- ☐ Other.
  frequent repetition with favorite texts

Intermediate Level: Parent provides support outside the school day.

- ☐ Read to the child each day
- ☐ Read with the child each day.
- ☐ Talk with the child about what they are reading and/or watching
- ☐ Encourage child to use reading for a variety of reasons: recipes, newspapers, magazines, lists, letters, etc.).
- ☐ Monitor the child's homework
- ☐ Attend parent/teacher conferences.
- ☐ Provide additional support in the following ways

Douglas County School District Re.1 - Instructional Support Services
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0080

SPECIAL EDUCATION TRANSPORTATION FORM

10/31/07		122955	122955
Meeting Date	Expected Starting Date	LASID	SASID

The following information must be provided with IEPs of students requiring special transportation as a related service.

Name of Student: [redacted] Endrew Robert DOB: [redacted] Grade 1 Track: A

INFORMATION SOURCE

Case Mgr
School Year: 2005-2006 Program: SSN Home School: SVE
Home/Address: [redacted]
School of Attendance: HE Parent/Guardian Name: [redacted] Joe and Jennifer
Telephone: Home: [redacted] Mother(w) Father(w):

Case Mgr./ Transport./ Parent
A.M. Pickup Location: Phone:
P.M. Dropoff Location: Phone:

Case Mgr / Parent
EMERGENCY CONTACT: Name: [redacted]
Phone [redacted]

Case Mgr./ Parent/ Nurse
EMERGENCY MEDICAL INFORMATION:
Student's Doctor M Capian Phone 303 770-0726
Hospital Preference: Littleton Address:
Allergies: Nuts
Current Medication: Focalin XR, lexapro Dosage: 15mg, 10mg,
Special Instructions for Attending Physician: Autism

Case Mgr./ Parent/ Nurse
IMPORTANT MEDICAL INFORMATION FOR SAFE TRANSPORTATION OF STUDENT
(include any special training needed by bus personnel, para support, etc.):

Photo Here (provided by transportation department)

Case Mgr.
SPECIAL INSTRUCTIONS FOR DEALING WITH STUDENT
(language, medical information, behavior, etc.)

SPECIAL BUS NEEDS (check all that apply): ☐ Wheelchair ☐ Restraint
☐ Walker ☐ Carseat ☐ ParaPro Other:

Case Mgr.
OTHER TRANSPORTATION ARRANGEMENTS (describe)

Case Manager (print): Ashley Grams Phone: 303-387-6751

Case Manager Signature

1 COPY WITH THE IEP, 1 COPY TO TRANSPORTATION

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Douglas County School District Re 1 - Instructional Support Services
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0080

DRAFT

Legal Name of Student: [redacted] Andrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Implementation Date: Draft

Behavior Intervention Plan

Contributors to Plan:
Ashley Grams SSN teacher
Hugh Redford School Psychologist

Background Information:
Dx with Autism
Takes ADHD meds. Takes Focalin XR, Zyrtec and Singulair.
Rarely interacts with peers or adults unless prompted
Obsesses over objects (timers) and routines (touching and saying same thing when passing a pod)
Often has wets his pants when frustrated.

Concerning Behaviors:
When Drew is fixated on an object such as a timer and staff attempts to re-direct him back on task, he will often respond by screaming, crying, running away to find another timer and throwing himself on the floor and will ultimately wet himself.

Frequency:
On average once a month but since 4/23/07 the tantrums are occuring almost daily.

Duration:
10-20 minutes

Function/Motivation for Behavior:
Reduction of anxiety and/or the possibility of power and control.

Behavior Goal 1:
Reduce incidents of tantrums/wetting pants

Definition of Success:
tantrums less than 2 times a week

Measures of Progress:
Teacher/staff report

Environmental / Preventative Strategies:
What:
Currently, Drew fixates on timers especially at the end of the day. Although recently, as of 5-22-07, Drew's obsession over the timers has occurred as early as 10:00 A.M. The ISS team has decided to incorporate earning "timer time" into his daily picture schedule.

Staff Responsible
All

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Legal Name of Student: [redacted], Endrew Robert LASID. 122955 SASID. 122955
School of Attendance: Heritage Elementary Implementation Date: Draft

Behavior Intervention Plan

Direct Teaching of Needed Skills:

What	Staff Responsible:
Increase frustration tolerance and anxiety reduction techniques.	MH, SSN teacher and paras, classroom teacher administration.

Teachable Moments / Responses to Behaviors:

When Student Does This	Staff Will Do This:
When Drew is not following directions or refusing work..	1) remind Drew that his computer time must be earned and say "Do you want computer?" 2) Use picture card boards to redirect back on to task. 3)attempt to use over correction, such as copying a particular sentence numerous times.
When Drew runs away. .	1) Staff will transport him back to the SSN room and use one of the following techniques: a)use deep pressure sensory (bean bags, swing) b)play slow down song while turning off lights. c)use the CPI restraint when he is in danger of hurting himself or others

Other Information / Actions To Be Taken:

When Drew obsesses over something, and he runs out of the classroom, physically restraining him seems to escalate the problem and should only be used if he is in danger of hurting himself or others.

Implementation Date: Draft Follow-up Meeting: Sep 14, 2007

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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted] Andrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 10/31/07

Comments

1. 05/31/05 Steffen, Julie - Level Matriculation Summary
Meeting Date. 05/20/05
Specific Services SSN team, speech-language therapy, OT

	Service Coordinator	#2	#3	#4	#5
Type of service provider (assignment)	ssn/slp/ot	OT/pam			
Projected beginning date of service	08/15/05	08/15/05			
Projected ending date of service	05/20/06	05/20/06			

	Hours of Special Education Services per Week by Service Provider				
Indirect (consultation)		0.25			
Integrated services in general classroom	9.25	0.50			
Direct outside general classroom	2.0				
Total hours by provider	11.25	0.75	0	0	0

Accommodations visual schedule as needed, visual work system, preferential seating, sensory strategies, mini-schedule for playground, provide wait time for responding, peer training, slantboard for writing, reminders to use the potty, wheat free nut free diet, social stories to teach new routines, modify curriculum
Setting Code: 41 Home School/General Classroom with Support/<21%
Participants in Meeting: Jennifer [redacted] Annette Nunez, Julie Steffen, Christine Sibona, Christy Ullery, Nancy Burdic, Kim Cline, Mrs. MacIntosh, Denise Alford, Melissa Bishop

2. 10/31/07 Grams, Ashley - 10/31/07 Upon reviewing Drew's IEP the team found it necessary to change Drew's service hours. The team feels he will benefit from intense individual instruction in the SSN room.

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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Date of Meeting: 04/30/08

Individualized Education Program (IEP) for: [redacted] Endrew Robert

Student Information

DOB [redacted]	LASID: 122955	SASID: 122955	Medicaid #:
Home School: Summit View Elementary		School of Attendance: Heritage Elementary	
Grade: 2 Track: Mod		Ethnicity: White (not Hispanic)	
Age [redacted] Gender: M		English Language learner?	Yes ☐ No ☒

Parent Information

Parent/Guardian	Parent/Guardian
Last Name: [redacted]	Last Name: [redacted]
First name: Joe	First Name: Jennifer
Address: [redacted]	Address: [redacted]
City: [redacted]	City: [redacted]
State: CO Zip: [redacted]	State: CO Zip: [redacted]
Home Phone: [redacted]	Home Phone: [redacted]
Work Phone:	Work Phone:
Relationship to Student: Parent(s)	Relationship to Student: Mother
Primary Language: English	Primary Language: English

Special Education Information

Date of Initial Eligibility Meeting: 06/25/02 (month/day/year)

Date of Last IEP Review: 05/10/07 (month/day/year)

Date of Next Eligibility Meeting: 04/29/11 (month/day/year)

Date of Next Annual Review: 04/30/09 (month/day/year)

Reason for Meeting: Initial _____ Annual _____ *Reevaluation (Triennial) _____ Other X

* Required for change in disability, significant change in placement, or exit from special education program

Primary Disability: Physical Disability / Autism

Setting Code: 302 (L.M.41)

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EXHIBIT 2

Douglas County School District Re.1 - Instructional Support Services
620 Wilcox St, Castle Rock, CO 80104
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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student [redacted], Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Participants in Meeting

Initials indicate participation only.

The following participants must be in attendance:
(please print name and initial if you are in attendance at the meeting.)

Jennifer [redacted] JP Student's Parent/Surrogate Parent (unless parent decided not to attend)	Student's Parent (unless parent decided not to attend)
Ashley Grams AG Special Education Director/Designee	Robin Kessel RK Special Ed Teacher / S/L Pathologist
Pam Deyoung PD General Education Teacher (if the student is or may be participating in the general education environment)	Student (when appropriate)
Ron Schumacher RS Building Principal / Designee (for eligibility only)	Interpreter (when appropriate)

Others with knowledge and expertise regarding this student:

Ranae Pappas RP Speech / Language Pathologist	School Nurse
Denise Alford DA Occupational Therapist	Physical Therapist
Hugh Redford HR School Psychologist	Caroline A Waddell CW School Social Worker
Audiologist	School Counselor
	Nicki Reese NR Other (specify area represented)
Amy Holton Non-Attendee	Non-Attendee
Non-Attendee	Non-Attendee

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Douglas County School District Re.1 - Instructional Support Services
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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting 04/30/08

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

Educational

Evaluations Administered/Date and/or Information Reviewed Include classroom observation other than classroom teacher.	Name of Evaluator	Date
	Amy Holton	04/15/08

Drew was administered the Brigance Inventory of Basic Skills he was given this test over a 3 day period. The results are to be considered an accurate overview of Drews strengths and areas for growth. The following are the results:

Readiness: Drew tested strong in this area. He does need to improve in his communicating of personal data such as his address, city and state, and birthday with year. Drew demonstrated a level of understanding of most directional and positional concepts needing some work with forwards/backwards, outside, center/corner, in front, etc.

Listening: Drew is able to identify all his letter sounds, understand directions up to 2 steps, and his sentence memory is up to 8 words. He did struggle with some of the comprehension sections of this test due to his language issues.

Word Analysis: Drews results show that he needs continued reinforcement in distinguishing long and short vowel sounds, he also needs continue instruction in suffixes and prefixes and words with phonetic irregularities (EX: silent L, -tion, g (j), wr (/r/)) Drew was able to read most initial blends and words with common endings.

Math: Drew was able to recognize and read numbers to 9,999. He has no trouble with addition and subtraction facts. Areas for growth include, using ordinal numbers, and using money and time in functional situations.

Drew was also administered the Woodcock-Johnson test of achievement. The following are the results from his test with a normal range being 90-110.

Broad Reading: 68
- Letter-Word Identification- 94
- Reading Fluency-64

Passage comprehension-48

Broad Math: 88
- Calculation-96
- Math Fluency-119
- Applied Problems-77

Broad Written Language: 82
- Spelling-91
- Writing Fluency-77
- Writing Samples-87

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Legal Name of Student [redacted], Endmw Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

continued .

Reading for Drew was lower than the other sub tests. This is due in part because of Drews needs to use visuals to help with his comprehension and because Drew relies heavily on teacher support to gain comprehension and organize information.

Math is calculations and fluency is strength for Drew. He does struggle with apply math concepts as they related to everyday problem solving due in part because of the language.

Drews writing scores could have been higher if he had applied the proper conventions to his writing. He often did not apply capitalization or punctuation rules. When writing he would look at the examiner for the verbal cue to place a punctuation mark, but would not without the examiners consent.

DRA level is 24 for instruction and a 20 for independent reading with modifications made for comprehension on all levels.

Present Level of Educational and Functional Performance

How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

Presently Drew is in Mrs. DeYoungs general education classroom for the majority of the day. He receives services in the SSN room for reading and writing and for his sensory needs. In Mrs. DeYoungs class, Drew does have significant support from the SSN staff.

Drew is presently performing consistently at a beginning to middle 2nd grade level with some independence. With support and modifications, he can do most grade level work. He is very capable but will make choices to challenge especially with new teachers or paras. Drew is highly distractible and works best when in a quiet one-on-one structured environment.

Reading: Drew continues to need support in reading. He is can read at grade level depending on the text and genre. Drew benefits from pre-reading activities such as picture walks, identifying vocabulary, etc. Currently Drew uses a variety of visual cues to help in comprehension.

Writing: Due to Drews language difficulties, writing is an area where Drew needs continued support. He benefits from visual aides as well as breaking down and modifying his planning of writing.

Math: Drew is above grade level in computation skills. Math is often used as a calming choice when he is upset. Applying math concepts to word problems or life skills is an area for growth with Drew.

☐ Not a current area of concern due to existing information (If appropriate, please check)

Educational Needs

Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?

Drew needs a time to process information from the general curriculum in a variety of ways and multiple times. He needs to be given visual cues in an organized form. Drew benefits from sensory breaks

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

continued...

especially when tasks are difficult/frustrating or the environment is over stimulating. Drew makes the most progress when he is given clear expectations, with clear rewards and the end of meeting his expectations.

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Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

continued...
conversation with him but his attention varies.

Speech: Drew is usually understood by others when he communicates. He exhibits three developmental speech errors: w/l (wamp for lamp), w/r (cwayons for crayons) and f/th (toof for tooth). These errors are not uncommon in young children and they do not significantly affect his intelligibility. However, he is reaching an age that these sounds could be addressed in speech and language therapy. His loudness level varies and he has to be prompted to use a louder voice to be understood. Drew's pitch will vary with increased anxiety and is judged high at times. His typical pitch is appropriate when compared to children his age.

Communication Rating V = 0 F = 0 A = 2 L = 3 Total CRS = 4 OR FC = 3

Comment. Drew has a mild articulation delay and a moderate functional communicative disability.

Present Level of Educational and Functional Performance
How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

Nancy Burdic 5/05: Drew has demonstrated strong growth in specific receptive and expressive language skills. What continues to be challenging for him is the generalization of these skills to enhance communication while in school. He is showing greater interest in connecting with his friends and teachers, but the types of interactions remain limited. In the classroom environment, he is most successful at requesting and making comments about what is of interest to him. This can often result in verbal perseverations, which have great meaning to Drew, but are often not contextually relevant. Drew appears anxious during these times, demonstrating heightened movement, rigid responses to attempts at re-direction, emotional outbursts, and increased tension. This strong focus on specific items/events appears to prevent him from processing what is going on in the classroom, interacting meaningfully with his peers without facilitation, and actually exchanging information with communication partners.

Ranae Pappas 4/08:
Drew attends speech and language therapy in a small group setting 2 times a week for 30 minutes each. He will engage in reading outloud and answering simple "wh" questions, such as Who, What and Why. He will also complete written assignments with assistance that develop his comprehension of the text. Data collected from August through October of this school year showed that Drew had 60% accuracy in understanding the text he read. The data collected between November and April for this school year revealed that he had 80% accuracy in comprehension.

A language sample taken in April, 2007, revealed that Drew used short utterances consisting of 2 to 4 words per utterance. For example: " The bird. Don't bird. Didn't listen. He did bird out. The bird flew away." Drew has made significant growth in his spontaneous language. He currently uses 4 to 5 words per utterance. His utterances are more spontaneous than echolalic, and more appropriate to the topic at hand. His grammatical complexity has also improved as well as the clarity of his messages. Examples are as follows:
It's a picture.
He's pouring mlk.
He's waking up Mom up.
They are red and yellow and blue flowers.
This is great.
Sorry.

Drew continues to exhibit articulation errors in his speech. These errors are not judged significant in

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Legal Name of Student: [redacted] Endrew Robert LASID. 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting. 04/30/08

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

continued...

terms of intelligibility, but he is at an age that correction can still occur. Improvement with eye contact has been limited. Because his language development has been significant, he should be encouraged to develop pragmatic/social language skills that include making and maintaining eye contact with peers and adults.

☐ Not a current area of concern due to existing information (If appropriate, please check)

Communicative Needs

Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?

To improve his pragmatic/social language skills, specifically eye contact and informing others about himself.
To improve his articulation skills.

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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

Pertinent Family Information

Evaluations Administered/Date and/or Information Reviewed Include adaptive behavior for student with suspected SLIC disability.	Name of Evaluator	Date
	Caroline Waddell L C S.W	04/30/08

No updated Information in the areas of family, health (see nurse's report) or Instructional Support Services. Jennifer's main request is more support in the areas of mental health. Because Drew is a sensory child, she suggests a recess group where upon he could sign up with one buddy per week to play with. This would need to be monitored by an adult. He enjoys physical sensory type things such as hide and seek or playing the game tag. All of his interactions would not need to be question driven with his peers. The focal point would be the involvements/ interactions at recess.

Also, if the schedule permits, Drew could follow recess with the same buddy or buddies to have lunch. Again this would need to be guided by an adult to foster conversation (most likely about the events of recess). Repetition will be key for Drew to establish a social routine.

Mental health support could also include a small group inside upon focusing on eye contact, turn-taking, game-playing and even possible social stories.

05/20/05
Home visit with Mrs. [redacted] record review, team consultation Drew has been attending preschool at the Rock Canyon site 4 days/wk and enjoys going to school. This is Drew's third year with the preschool program. Mrs. [redacted] continues to be pleased with Drew's developmental progress. He is typically using 3 word phrases (and some 4 word phrases) to convey his needs/wants (e.g., "mommy, sit down"). Drew's mom feels the ideas that he is able to verbalize have expanded and become more complex. He is also doing more verbal commenting during his play. In the area of language, the [redacted] top current priority is Drew's articulation errors which increase when he is excited and talking rapidly. Drew seems to be more receptive to interactions with peers and now his family would like to see him using his language in these social interactions. Drew continues to enjoy and do well with gross motor activities and has less interest in the fine motor activity of writing. Drew is able to write his name and draw some simple shapes; his mom remains concerned about his tool grip. Drew continues to participate in private treatment that includes 9 hrs/wk of home training and 3 hrs/wk of an integrated play group with Annette Nunez. Since 10/04 Drew has been taking Ritalin and his mom feels it has decreased his impulsivity and improved his body control. The Vineland Adaptive Behavior Scales was completed with Mrs. [redacted] to assess Drew's adaptive skills and yielded the following results:DOMAIN

	STANDARD SCORE	PERCENTILE RANK	ADAPTIVE
LEVELCommunication	72		3
	Mod. LowDaily Living Skills		64
	1		
LowSocialization	68		
	LowMotor Skills		
2		14	
84		66	
Mod. LowOverall Composite		LowDrew's overall adaptive skills are	
1			

at the 1st percentile when compared to peers which is consistent with a diagnosis of Autism Spectrum

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

continued...

Disorder. Mrs. [redacted] has noticed some increased rigidity from Drew recently around having to take the same route to school and get out of the car on a specific side and hopes he can gain some more flexibility. Mrs. [redacted] is eager to learn more details about Drew's transition to kindergarten including what steps can be taken to increase Drew's success in his process and what schedule will be utilized to help him with the routine in the new setting. The [redacted] have been terrific advocates for Drew's educational needs and proactive in utilizing school, private and community resources to support Drew's progress.

Present Level of Educational and Functional Performance

How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

Mrs. [redacted] feels Drew's limited communication and social skills will continue to require adult support in order for him to maximize learning and participation in the classroom setting. The family greatly values frequent communication between school and home to support Drew's progress.

☐ Not a current area of concern due to existing information (If appropriate, please check)

Needs

Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?

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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

Social/Emotional

Evaluations Administered/Date and/or Information Reviewed Include adaptive behavior for student with suspected SLIC disability	Name of Evaluator	Date
	Caroline Waddell L.C.S.W	04/29/08

Drew has been attending a daily "Lunch Bunch" with two of his classmates. The classmates daily rotate who will share lunch with Drew. The group is facilitated by an adult. The adult will prompt either Drew or the peer to ask basic questions; such as; "What are you having for lunch?" or; "What did you do this weekend?". Drew has attended in reciprocal conversation overall approximately 25% of the time, this could be due in part to the loudness of the lunch room and children having to yell over one another. The group has been somewhat successful in that Drew is expected to ask his peers questions. It will be important to continue working on generalized eye contact so that his peers feel he is listening to them.

5-15-05: Drew has made steady progress in this area. He transitions into class easily. He will occasionally greet peers using their name however, often without purposeful intention. Drew seems to enjoy taking turns with his friends and will at times request a turn or offer a turn independently. This seems to depend on the toy he is playing with and his motivation for the toy. During play, Drew continually requires prompting to stay focused and attentive. His play is mainly single step play and can be perseverative at times. He is able to link 2-3 steps in play when the motivation is high. Drew attends and enjoys an integrative play group several times per week and progress has been reported. Drew enjoys recess time however needs a visual schedule to explore other playground equipment. He prefers to stay in the playhouse and will interact with others if they are inside the house with him.

Present Level of Educational and Functional Performance
How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

Drew's desire and interest for social interactions has increased. He derives pleasure from his peers. Drew continues to demonstrates a high level of distractibility and perseverative behavior which interfere with his play and communication in an integrated setting. Drew gets "stuck" on certain toys and materials (currently the timer and the frog jack-in-the-box)and it is very difficult for him to be re-directed. This behavior has increased over the last several months. In an attempt to increase attention, reduce anxiety, increase play and social interactions, and increase generalization of academic skills the following strategies have been used:visual organization system (drawer system), many variations of a visual picture schedule (name card, directional words, and center name disc to transition), re-direction, reinforcement systems, over-correction, physical boundaries to keep desired toys out of sight, TEACCH work system, preferential seating during large group, systematically scheduling time to play with desired toys, head phones and visor/hat to reduce auditory and visual distractions, and behavior momentum phrases as a re-direction. These teaching strategies have been used systematically however Drew's verbal perseverations continue to exist. It is felt that his desire for these toys and materials seems out of his control and he appears to exhibit anxious behavior (increase in perseverative phrases, increased fidgeting or activity level, decrease in focus, and an increase in emotional outbursts) when he cannot play with the toys or when he is asked to complete his work first. Drew has been taking Ritalin since 10/04 which initially seemed to help with focus and attention. Recently the previous effect has not been observed in the school environment. Currently Drew's emotional state affects his ability to work and interact with his peers. When his anxiety is down we see

Legal Name of Student: [redacted] Endrew Robert LASID: 122855 SASID: 122855
School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

continued

more focus and purposeful behavior in the classroom.

☐ Not a current area of concern due to existing information (If appropriate, please check)

Social/Emotional Needs

Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?

Improve attending skills to increase task completion and independenceDecrease anxiety/increase complexity of play and appropriate use of materials during play/increase reciprocal peer interactions and length of social exchanges

Douglas County School District Re.1 - Instructional Support Services
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0080

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

Cognitive

Evaluations Administered/Date and/or Information Reviewed Include adaptive behavior for student with suspected SLIC disability.	Name of Evaluator	Date
	H. Redford, Ed.S.	04/29/08

The School Function Assessment (SFA) is used to measure a student's performance of functional tasks that support his/her participation in academic and social aspects in school grades K-6. The SFA is comprised of 3 parts:

Part 1-Participation. Examines a student's level of participation in 6 major school settings: regular or special ed classroom, playground/recess, transportation to/from school, bathroom, transition to/from class and mealtime.

Part 2-Task Supports. Examines the supports provided when the student performs school related activities. The 2 types of supports examined are: Assistance (adult help), and Adaptations (modifications to the environment) such as adapted materials or specialized equipment.

Part 3-Activity Performance. Examines the student's performance on specific school related functional activities. Activities include: Functional Communication, Memory and understanding, Following social conventions, Compliance with directives and school rules, Task completion, Positive interaction, Behavior regulation, Safety and Personal care awareness.

Drew was rated by his SSN one to one aid. Drew requires Extensive to Moderate assistance and adaptations on all cognitive/behavioral tasks with the exception of the memory and understanding area where he needs only minimal assistance and adaptations.

Drew is able to communicate yes/no, acceptance/refusal or a choice between two or more items with consistent performance. On the other hand, he rarely advocates for himself when he needs help with a functional academic tasks such as opening a container or where he would go if he were lost.

Drew's personal strength is in the area of memory and understanding. For example, he is able to remember daily routines and basic one step directions such as stop, come here and get book with consistent performance. Additionally, Drew cocsistently demonstrates an ability to follow a series of three or more related instructions (such as put things away, put on your coat, and line up).

Drew is inconsistent in the area of following social conventions. For example he will often use words such as please, thank you and sorry when appropriate but does not recognize how and when to communicate private matters such as a toileting accident.

Compliance with adult directives and school rules are significantly below that of same aged peers. While Drew generally will observe rules around movement around the classroom/school, when he is in a state of obsession/compulsion usually around timers and watches, he has difficulty responding to redirection and will not stop immediately when instructed to do so.

Drew requires significant assistance from others to maintain his safety, task completion, personal care and behavioral regulation.

The Universal Nonverbal Intelligence test (UNIT) was attempted with Drew. The examiner is not allowed to use words to demonstrate the tasks. While Drew picked up on many of the nonverbal gestures such as wait and begin, his attention to task and fleeting eye contact made his subtest score invalid.

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID. 122956
School of Attendance: Heritage Elementary Date of Meeting: 04/30/06

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

continued

5-15-05. Classroom observation, review of records, update of information from teacher, Kaufman Brief Intelligence Test (K*BIT). In February of 2004, Drew's cognitive development was evaluated at the request of his mother and pediatrician (please see separate report). At that time, the Differential Ability Scale (DAS) was attempted but only partially successful. In the classroom, Drew's behavior and attention was nicely developed for familiar tasks and his behavior during testing was atypical for him, but indicative of being taken out of his routine and presented with novel tasks. Drew participated with the verbal items but his attention and behavior prevented completion of the nonverbal items. Verbally on the DAS, Drew's concept knowledge (Naming Vocabulary T = 33) was significantly stronger than his understanding of more abstract verbal information (Verbal Comprehension T=24) and his overall verbal thinking skills were significantly delayed for his age (Verbal SS = 64). Understanding relationships in pictures was challenging for Drew as well (Picture Similarities T=24). Drew's direct matching skills were strong but matching based on similarities or simple categories was a challenge for him. The Developmental Observation Checklist System (DOCS) was completed by Drew's teachers to determine the validity of the DAS. Drew's cognitive development, as reported by his teachers responses on the DOCS, continued to show a pattern of significant delay (SS=64) that was consistent with the DAS and approximated the 23 month age level. Although his scores were more indicative of a 2 y[illegible] old, Drew's teachers felt that with facilitation and a familiar routine, his functioning in the classroom was more like a new 3 year old. Currently, Drew is functioning within the Below Average range of intelligence at the 8th percentile (SS=79) on the K*BIT. His true score should fall within the range of 69-89 with 95% accuracy. This is somewhat improved from his performance last year on the DAS and the DOCS, which may be attributed to his being on Ritalin. Drew's vocabulary knowledge was Below Average (SS=75), as were his nonverbal reasoning skills (SS=87). Although on Ritalin, Drew was extremely distractible during this assessment, which negatively impacted his performance. He appeared stressed to be out of his class and routine, often looking into the class and repeating whatever was being said in class. Even given his distraction, this appears to be a fairly accurate estimate of Drew's current level of thinking based on his classroom performance and teacher report.

Present Level of Educational and Functional Performance

How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

Drew's thinking skills are impacted by his language delays and attention. He learns and performs best within a structured and familiar routine given visual cues. Generalizing his skills to different settings continues to be challenging for him.

☐ Not a current area of concern due to existing information (If appropriate, please check)

Cognitive Needs:

Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?

*Improve attention and verbal thinking.

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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

Current Health Evaluation - Nurse

Evaluations Administered/Date and/or Information Reviewed Include classroom observation other than classroom teacher.	Name of Evaluator	Date
4/28/08 Reviewed school records, IEP reports, and the health information update form completed by Jennifer [redacted] mother. No significant medical concerns reported regarding the pregnancy or Drew's birth. Mom notes that Drew experienced some speech delays. Drew has been diagnosed with Autism (2001) and ADHD (2005). He is currently taking Lexapro, Focalin and guanfacine daily. Mom reports that side effects Drew has experienced include some sleep disruptions. Mom also notes that Drew has some anxiety. Additionally, Drew has seasonal allergies. Drew has very good school attendance. Unable to screen for vision at school. No concerns in the classroom regarding vision. Hearing tested by district audiologist. K. Mueller RN,BSN	K. Mueller RN,BSN	04/28/08

Present Level of Educational and Functional Performance
How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

Drew's symptoms of Autism including limited social interctions and ADHD including inattention and distractability impact his ability to access the general curriculum. See IEP reports for current academic progress.

☐ Not a current area of concern due to existing information (If appropriate, please check)

Health Needs:
Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?

Drew needs to work on developmentally appropriate attention skills in order to better access the general school curriculum.

- Results of vision screening: unable to test at school. No reported vision concerns
- Results of hearing screening.
- Health care plan? yes
- How does it relate to the suspected disability? symptoms, side effects of medications

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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student [redacted] Endrew Robert LASID. 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

Physical Motor/Other Health Related

Evaluations Administered/Date and/or Information Reviewed (Include classroom observation other than classroom teacher)	Name of Evaluator	Date
	Denise O Alford MS, OTR	04/30/08

Beery-Buktenica Developmental Test of Visual Motor Integration (VMI)

Subtest	Standard Score	Scaled Score	Percentile Rank
Visual Motor Integration	65/*77	3/*5	1%/*6%
Visual Perception	90	8	25%
Visual Coordination	59	2	.7%

*= score using drawings from BOT2

Visual motor integration is the ability to copy a visual stimulus. The visual perception subtest requires the student to determine the salient features of visual stimuli and be able to pick out the matching stimuli. The final subtest is visual motor coordination which assesses the child's ability to control finger and hand movements while drawing within a targeted area. This can correlate with handwriting neatness. Standard scores between 90 and 109 on each subtest are considered average. Drew is very inconsistent with his performance. The VMI and part of the BOT2 required him to do the same drawings and he performed better on one than the other due to his attention to the task. There are times when he is completing tasks and he is so distracted that he does not even look at what he is doing but instead is looking around the room and talking constantly. He is right hand dominant and holds the pencil with a functional grasp. He completed all the tasks quickly with little attention to details which is consistent with his daily performance. Due to low postural control, he was laying on the desk or supporting his head on his elbow. In general, his visual perceptual skills are a strength for him.

Bruininks-Osteretsky Test of Motor Proficiency (BOT2)

Subtest	Scaled Score	Standard Score	Percentile Rank
Fine Motor Precision	6		
Fine Motor Integration	7		
FINE MANUAL CONTROL		29	2%
Manual Dexterity	12		
Upper Limb Coordination	3		
MANUAL COORDINATION		24	1%

The BOT2 has a different scoring system where the scaled scores are based on a mean of 15 and the average range is from 10-20. The standard scores are based on a mean of 50 and the average range is from 40-60. Percentile ranks are the same as the above test. The Fine Motor Precision subtest assess his ability to use a pencil with precison and also assesses cutting skills, visual motor skills. The Fine Motor Integration subtest evaluates the same skills as the first subtest of the VMI, a student's ability to near point copy a visual stimulus.

The above tests are standardized and directions were modified in order to increase Drew's ability to complete the tasks. On the timed tasks, Drew was focused on the stop watch and it was difficult to get him to fully attend and participate in the task. The scores above appear to be an underestimate of his

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Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

continued...

abilities as noted by his ability to write and perform other functional tasks. However, fine motor and visual motor skills are not strengths for him.

The School Functional Assessment (SFA) is designed to measure a students performance of functional tasks that support his participation in the academic and social aspects of an elementary school program. It is a questionnaire that is criterion referenced against his peers (K-3) and that was completed by Denise Alford, OTR, with assistance from Amy Holton- SSN teacher, and Dixie Litzenberer , para-professional. The areas where he scored the same or better than his peers were; Maintaining and Changing Positions, and Computer/ Equipment Use. Maintaining and Changing Positions is his ability to move from one position i.e. the floor to standing and all of the positions in between. In the area of computer use he is able to use the mouse and hit specific keys in order to carry out tasks and enjoys the computer.

He demonstrates moderate differences from his peers in the areas of Travel, Manipulation with Movement, Set-up/ Clean-up, Eating and Drinking, Hygiene, Clothing Management, and written work. Travel assesses his ability to move throughout the school building. He is able to physically ambulate throughout the building but lacks awareness of safety and the awareness to modulate his speed to adapt to his surroundings. Manipulation with Movement assesses his ability to pick up and carry objects. The areas where he struggles are walking through congested areas without bumping into others and carrying fragile or spillable objects. In the area of set up and clean up he occasionally has difficulty opening containers or packages such as within his lunch or snack. He is independent with toileting and needs cues to wash his hands, wipe face, and blow his nose. In the area of clothing management, he is able to put on and take off his clothes but is unable to do fasteners independently. Written Work, which assesses his ability to complete written assignments with the same speed and quality of his peers. Drew can write legibly but requires assistance to get him to slow down, leave spaces between his words, organize the page, and copy information from a distance. His copying information which is on the same surface that he is writing, near point copying, is relatively accurate, but his accuracy decreases when he is copying from a different surface i.e. from the white board to his desk, far point copying.

The areas of greatest difficulty for Drew are Recreational Movement and Using Material. Drew does not know how to pump a swing and lacks consistent ball skills. Gross motor skills in general are a challenge for him, demonstrating difficulties with balance, only standing on one foot for 2-4 seconds. He also experiences low endurance and overall strength. The area of Using Materials assesses his abilities in art related activities and using classroom materials such as tape dispensers. Art projects are not easy for Drew and he does not perform the same as his peers in the areas of using multiple media for a project, drawing, or cutting, in fact occasionally needs prompts for holding the scissors correctly. Tearing tape off from a tape dispenser and using a paper clip to secure papers are tasks where he needs assistance

The Sensory Profile School Companion is also a questionnaire but is designed to determine a students sensory processing abilities are within the school environment. This was completed by Drew's SSN teacher, Amy Holton.

QUADRANT	
1. Registration	Definite Difference, more than others
2. Seeking	Definite Difference
3. Sensitivity	Typical Performance
4. Avoiding	Definite Difference, more than others

SCHOOL FACTORS

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Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

continued

1. School Factor 1	Definite Difference
2. School Factor 2	Typical Performance
3. School Factor 3	Definite Difference
4. School Factor 4	Definite Difference

SENSORY PROCESSING

1. Auditory	Definite Difference
2. Visual	Typical Performance
3. Movement	Definite Difference
4. Touch	Definite Difference
5. Behavior	Definite Difference

Drew definitely has difficulty with his ability to integrate sensory information. This is most evident by his distractibility, constant need for fidgeting or movement, and need to touch things. Loud noises including in the cafeteria, parties, and assemblies can cause Drew distress and he will begin to wander or yell out. He will also seek out timers and computer screens when he is distressed or appears anxious. Organization of his physical environment is very difficult for him. He avoids eye contact with others. On the playground, he prefers to sit under the equipment and toss pebbles. In general he is very low tone, laying on his desk and demonstrates postural weakness. At times he can perseverate on topics especially timers and computers. His sensory needs do impact his daily life. He does well with deep pressure chewing on items such as straws or sucking through the straws which improve his activity level and performance on specific tasks. Movement activities tend to increase his level of alertness.

Sensory Profile-a questionnaire that determines how a child processes sensory information. This was completed by Jennifer [redacted] April 26, 2007.

SENSORY PROCESSING

Auditory Processing	Probable Difference
Visual Processing	Typical Performance
Vestibular Processing	Definite Difference
Touch Processing	Definite Difference
Multisensory Processing	Definite Difference
Oral Sensory Processing	Typical Performance

MODULATION

Sensory Processing Related to Endurance /Tone	Probable Difference
Modulation Related to Body Position and Movement	Definite Difference
Modulation of Movement Affecting Activity Level	Probable Difference

Modulation of Sensory Input Affecting Emotional Responses Definite
Modulation of Visual Input affecting Emotional Responses and Activity Level Probable Difference

BEHAVIOR AND EMOTIONAL RESPONSES

Emotional/Social responses	Definite Difference
Behavioral Outcomes of Sensory Processing	Definite Difference
Items Indicating Thresholds for Responses	Definite Difference

The Sensory Profile can be broken down by factors that are influenced by sensory integration

Sensory Seeking	Definite Difference
Emotionally Reactive	Definite Difference
Low Endurance/Tone	Probable Difference
Oral Sensory Sensitivity	Typical Performance
Inattention/Distractibility	Definite Difference
Poor registration	Definite Difference

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Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

continued...

Sensory Sensitivity	Typical Performance
Sedentary	Typical Performance
Fine Motor/Perceptual	Probable Difference

Present Level of Educational and Functional Performance

How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

Providing structure improves Drew's performance in his motor activities. Attention to task impacts his ability to perform at his highest level. Drew benefits from sensory activities to help him organize himself internally. Since visual perception is a strength for him, using visual cues, picture schedules and cues to break the tasks down increases his performance.

☐ Not a current area of concern due to existing information (If appropriate, please check)

Physical Motor/Other Health Related Needs

Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?

Drew needs to improve his sensory skills and motor performance as related to academics

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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Determination of Eligibility and Disability

(This section completed only for eligibility meetings)

Have sufficient and appropriate evaluations been completed, documented, or considered to determine the presence of an educational disability? ☑ Yes ☐ No

If not, obtain additional information and reconvene the meeting

(This section completed only for eligibility meetings.)

Does the student have a disability as defined in the State Rules for the Administration of the Exceptional Children's Education Act? (complete and attach appropriate checklist) ☑ Yes ☐ No

If no, terminate the meeting

(This section completed for all meetings.)
If the student has a disability, the disability is:
(If more than one disability is determined, the primary disability should be identified with a 1, the secondary disability with a 2

- ☐ 01 Significant Limited Intellectual Capacity
- ☐ 03 Significant Identifiable Emotional Disability
- ☐ 04 Specific Learning Disability
- ☐ 05 Hearing Disability (requires communication plan)
- ☐ 06 Vision Disability (requires literacy plan)
- ☐ 08 Speech or Language Impairment
- ☐ 11 Preschool Child with a Disability

Physical Disability

- ☐ 14 Traumatic Brain Injury
- [1] 13 Autism
- ☐ 07 Other Physical Disability
  - ☐ Check if physical disability due to ADD/ADHD

Multiple Disabilities

- ☐ 09 Deaf-Blind
- ☐ 10 Multiple Disabilities with Cognitive Impairment

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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 122955
School of Attendance Heritage Elementary Date of Meeting: 04/30/08

Academic/Functional Goals and Objectives

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the extent of nondisabled children.

Annual Goal: 1. The student will demonstrate basic language and communication skills in order to access the general education curriculum as measured by the following objectives:

Standard/ Access Skill: Communication and Basic Language Skills

Short-term Objective: a) Drew will state his first and last name, and his birthday (day, month and year) Start: 04/30/08 End: 04/30/09

Checkpoint:

Criteria: >= 5 successes in multiple environment(s)

Narrative:

Baseline: <= 5 occurrence in multiple environment(s)

Narrative: Drew cannot state his full name or birthdate

Methods(s) of Measurement: Oral performance, Demonstration/Performance

Progress Reporting

Period End: Level: Status:

Comments:

Short-term Objective: b) Drew will make and maintain eye contact with peers and adults. Start: 04/30/08 End: 04/30/09

Checkpoint:

Criteria: >= 5 occurrence with <= 1 verbal prompts in multiple environment(s)

Narrative:

Baseline: <= 5 occurrence with >= 2 verbal prompts in multiple environment(s)

Narrative: It is difficult for Drew to make and maintain eye contact with others even with verbal prompting.

Progress Key:

1. Skill / behavior is rarely or never demonstrated, therefore incomplete positive data is available
2. Skill / behavior is inconsistent with frequent prompts and is below expectations of plan.
3. Skill / behavior is consistent over time with few prompts and meets expectations of plan.
4. Skill / behavior is generalized and transferred without prompts and is above expectations of plan.

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Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Academic/Functional Goals and Objectives (con't)

Methods(s) of Measurement: Demonstration/Performance, Observation.

Progress Reporting

Period End: Level: Status:
Comments:

Short-term Objective: c) Drew will improve his articulation skills by producing the "l" sound in the beginning sounds in words
Start: 04/30/08
End: 04/30/09

Checkpoint:

Criteria: >= 80 percent with <= 1 verbal prompts

Narrative:

Baseline: <= 40 percent with >= 2 verbal prompts

Narrative: Drew currently substitutes "w" for "l" in single words and words with "l" blends.

Methods(s) of Measurement: Oral performance, Demonstration/Performance

Progress Reporting

Period End: Level: Status:
Comments:

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Legal Name of Student: [redacted], Endrew Robert LASID: 122855 SASID: 122855
School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the extent of nondisabled children.

Annual Goal: 2. The student will Demonstrate the ability to read and comprehend a variety of instructional-leveled texts, as measured by the following objectives:

Standard/ Access Skill: Language Arts, 4

Short-term Objective: a) Given text at an instructional level, Drew will read a passage and retell it in logical sequence providing 1-2 details and answering WH questions about the passage
Start: 04/30/08
End: 04/30/09

Checkpoint: K - 3 (4.1): Uses a variety of strategies (e.g., context clues, picture clues, phonic cues, word substitutions) to recognize and comprehend words in text

Criteria: >= 80 percent in 3 out of 4 consecutive trials

Narrative:

Baseline: "3) Performs activity with verbal/gestural cues"

Narrative: Drew currently needs a lot of support

Methods(s) of Measurement: Written performance, Oral performance.

Progress Reporting

Period End: Level: Status:
Comments:

Short-term Objective: b) Given a text at an instructional level, Drew will be able to make predictions and draw simple inferences from the story.
Start: 04/30/08
End: 04/30/09

Checkpoint: K - 3 (4.2): Uses a variety of strategies (e.g., activating prior knowledge, visualizing, previewing and predicting, self-monitoring) to comprehend narrative and expository text.

Criteria: >= 80 percent in 3 out of 4 consecutive trials

Narrative:

Baseline: "0) Does not participate"

Narrative: Drew can make some predictions with lower level text. He has not begun making inferences in text

Methods(s) of Measurement: Written performance, Oral performance.

Progress Reporting

Period End: Level: Status:
Comments:

Short-term Objective: c) Drew will strengthen his decoding skills focusing on suffixes/prefixes, phonetic irregularities and continuing to work on vowel sounds
Start: 04/30/08
End: 04/30/09

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School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Academic/Functional Goals and Objectives (con't)

Checkpoint: K - 3 (4.1) Uses a variety of strategies (e.g., context clues, picture clues, phonic cues, word substitutions) to recognize and comprehend words in text.
Criteria: >= 80 percent in 3 out of 4 consecutive trials

Narrative:

Baseline: "3) Performs activity with verbal/gestural cues"

Narrative: Drew stumbles to use strategies needs to decode new words.

Methods(s) of Measurement: Demonstration/Performance.

Progress Reporting
Period End: Level: Status:
Comments:

Short-term Objective: d) Drew will increase his DRA level as follows: Instructional: level 34 — Start: 04/30/08 End: 04/30/09

Checkpoint: K - 3 (4.3) Uses appropriate text based on the purpose for reading.
Criteria: >= 80 percent

Narrative: Drew will be able to use visual cues to help in his comprehension and DRA evaluation

Baseline: "0) Does not participate"

Narrative: Currently Drew is at a DRA level of independent 20 and instructional 24. With comprehension not factored in.

Methods(s) of Measurement: Written performance, Oral performance, Demonstration/Performance

Progress Reporting
Period End: Level: Status:
Comments:

Short-term Objective: e) Drew will recognize and read basic contractions in text — Start: 04/30/08 End: 04/30/09

Checkpoint: K - 3 (4.3) Uses appropriate text based on the purpose for reading
Criteria: >= 80 percent in 3 out of 4 consecutive trials

Narrative:

Baseline: "3) Performs activity with verbal/gestural cues"

Narrative: Drew currently skips over contractions and does not understand their meaning

Methods(s) of Measurement: Written performance, Oral performance, Demonstration/Performance.

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Academic/Functional Goals and Objectives (con't)

Progress Reporting

Period End: Level: Status:
Comments:

Legal Name of Student: [redacted], Endrew Robert LASID 122855 SASID 122955
School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon that document, parent(s) will be regularly informed of progress to the extent of nondisabled children.

Annual Goal: 3. The student will improve writing skills as measured by the following objectives:

Standard/ Access Skill: Language Arts, 3

Short-term Objective: a) Drew will use correct punctuation, capitalization and spacing in his writing. Start: 04/30/08 End: 04/30/09

Checkpoint: K - 3 (3 1) (Organization/Content) Organizes single-paragraph writing in a manner that develops and supports main ideas with relevant details.

Criteria: >= 80 percent in 3 out of 4 consecutive trials

Narrative: Drew will preform this goal with less than 2 prompts from the teacher

Baseline: "3) Performs activity with verbal/gestural cues"

Narrative: With numerous verbal prompts Drew can use correct punctuation, capitalization and spacing

Methods(s) of Measurement: Written performance, Demonstration/Performance

Progress Reporting

Period End: 11/09/07 Level: 3 Status: Will be continued (C).
Comments:

Period End: 03/03/08 Level: 3 Status: Will be continued (C).
Comments: Drew still needs reminders about his spacing and punctuation

Period End: 04/30/08 Level: 2 Status: Will be continued (C).
Comments: Drew has lost some independence in remembering to use correct conventions in his writing

Period End: Level: Status:
Comments:

Short-term Objective: b) Drew will know and apply rules for writing basic contractions Start: 04/30/08 End: 04/30/09

Checkpoint: K - 3 (3 1) (Organization/Content) Organizes single-paragraph writing in a manner that develops and supports main ideas with relevant details

Criteria: >= 80 percent in 3 out of 4 consecutive trials

Narrative:

Baseline: "0) Does not participate"

Narrative:

Methods(s) of Measurement: Written performance, Demonstration/Performance

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School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Academic/Functional Goals and Objectives (con't)

Progress Reporting

Period End: Level: Status:
Comments:

Short-term Objective: c) With a visual cue Drew will be able to write a 5 sentence paragragh with a begining, 3 sentence body and conclusion sentence
Start: 04/30/08
End: 04/30/09

Checkpoint: K - 3 (3.1) (Organization/Content) Organizes single-paragraph writing in a manner that develops and supports main ideas with relevant details

Criteria: >= 80 percent in 3 out of 4 consecutive trials

Narrative:

Baseline: "0) Does not participate"

Narrative:

Methods(s) of Measurement: Written performance, Demonstration/Performance

Progress Reporting

Period End: Level: Status:
Comments:

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the extent of nondisabled children

Annual Goal: 4. The student will communicate an understanding of number sense as measured by the following objectives.

Standard/ Access Skill: Mathematics, 1

Short-term Objective: a) Given a variety of coins and dollars, Drew will accurately count the money up to $5.00. Start: 04/30/08 End: 04/30/09

Checkpoint: K - 3 (1.1) Understands place value as it relates to whole numbers, 0 9,999

Criteria: >= 80 percent in 3 out of 4 consecutive trials

Narrative:

Baseline: "3) Performs activity with verbal/gestural cues"

Narrative: Drew can count money with a variety of coins but is inconsistent.

Methods(s) of Measurement: Oral performance, Demonstration/Performance

Progress Reporting

Period End: 11/09/07 Level: 3 Status: Will be continued (C)
Comments:

Period End: 03/03/08 Level: 3 Status: Will be continued (C)
Comments: Drew is still working on counting different coins and transitioning in and out of counting by 5s and 10s.

Period End: 04/30/08 Level: 3 Status: Will be continued (C)
Comments: Drew has made some progress, but we are still working on transitioning in and out of counting with a variety of coins.

Period End: Level: Status:
Comments:

Short-term Objective: b) Drew will understand time related vocabulary and concepts as it realtes to the calendar. Start: 04/30/08 End: 04/30/09

Checkpoint: K - 3 (1.6) Uses oral/written language to communicate an understanding of number sense "

Criteria: >= 80 percent in 3 out of 4 consecutive trials

Narrative:

Baseline: "0) Does not participate"

Narrative:

Methods(s) of Measurement: Demonstration/Performance.

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School of Attendance Heritage Elementary Date of Meeting 04/30/08

Academic/Functional Goals and Objectives (con't)

Progress Reporting

Period End: Level: Status:
Comments:

Short-term Objective: c) When given a clock, Drew will incicate the time shown on the face in quarter hours, five minutes and minute intervals
Start: 04/30/08
End: 04/30/09

Checkpoint: K - 3 (1.6) Uses oral/written language to communicate an understanding of number sense."

Criteria: >= 80 percent in 3 out of 4 consecutive trials

Narrative:

Baseline: "0) Does not participate"

Narrative: Drew currently identifies time only to the hour and half hour consistently.

Methods(s) of Measurement: Demonstration/Performance

Progress Reporting

Period End: Level: Status:
Comments:

Short-term Objective: d) Given a word problem, Drew will be able to identify which operation (addition, subtraction or multiplication) to use to solve the problem.
Start: 04/30/08
End: 04/30/09

Checkpoint: K - 3 (1.4) Uses number sense to estimate solutions and/or to justify the reasonableness of solutions to problems involving whole numbers.

Criteria: >= 80 percent in 3 out of 4 consecutive trials

Narrative:

Baseline: "0) Does not participate"

Narrative:

Methods(s) of Measurement: Written performance, Oral performance, Demonstration/Performance

Progress Reporting

Period End: Level: Status:
Comments:

Short-term Objective: e) Drew will learn his multiplication facts 0-10.
Start: 04/30/08
End: 04/30/09

Checkpoint: K - 3 (1.3). Understands basic mathematical properties (e.g., 2 + 3 = 3 + 2, n + 0 = n, 3 x 0 = 0, 3 x 1 = 3) and how they apply to whole numbers.

Criteria: >= 80 percent

Narrative:

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Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Academic/Functional Goals and Objectives (con't)

Baseline: 0) Does not participate

Narrative:

Methods(s) of Measurement: Demonstration/Performance

Progress Reporting

Period End: Level: Status:
Comments:

Legal Name of Student: [redacted] Andrew Robert LASID: 122955 SASID: 122955
School of Attendance Heritage Elementary Date of Meeting: 04/30/08

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the extent of nondisabled children

Annual Goal: 5 The student will improve his motor skills as related to academics as measured by the following objectives

Standard/ Access Skill: Physical

Short-term Objective: a) Either by independently identifying the need for a sensory break, Drew will choose appropriate strategies from a list of 10 — Start: 04/30/08 End: 04/29/09

Checkpoint:

Criteria: "3) Performs activity with verbal/gestural cues"

Narrative:

Baseline: "2) Participates with partial physical assistance"

Narrative:

Methods(s) of Measurement: Demonstration/Performance

Progress Reporting

Period End: **Level:** **Status:**

Comments:

Short-term Objective: b) Given a 1 inch button, he will button and unbutton — Start: 04/30/08 End: 04/30/09

Checkpoint:

Criteria: "3) Performs activity with verbal/gestural cues"

Narrative:

Baseline: "1) Participates with maximal physical assistance"

Narrative:

Methods(s) of Measurement: Demonstration/Performance.

Progress Reporting

Period End: **Level:** **Status:**

Comments:

Short-term Objective: c) Given a small ball, Drew will demonstrate the ability to catch it when thrown from 10 feet — Start: 04/30/08 End: 05/30/09

Checkpoint:

Criteria: >= 70 percent in 7 out of 10 consecutive trials

Narrative: Drew will catch the ball 7 out of 10 times

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Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Academic/Functional Goals and Objectives (con't)

Baseline: <= 30 percent

Narrative:

Methods(s) of Measurement: Demonstration/Performance

Progress Reporting

Period End: Level: Status:
Comments:

Legal Name of Student [redacted], Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting 04/30/08

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the extent of nondisabled children.

Annual Goal: 6 The student will improve social skills as measured by the following objectives

Standard/ Access Skill: Self-Advocacy / Self-Determination

Short-term Objective: a) Drew will increase independent work time — Start: 04/30/08 End: 04/30/09

Checkpoint:

Criteria: >= 75 percent in a time period of >= 15 min(s) with <= 2 verbal prompts

Narrative:

Baseline: "0) Does not participate"

Narrative:

Methods(s) of Measurement: Demonstration/Performance.

Progress Reporting

Period End: **Level:** **Status:**

Comments:

Short-term Objective: b) Increase ability to follow multiple step directions given orally or written — Start: 04/30/08 End: 04/30/09

Checkpoint:

Criteria: >= 75 percent in 3 out of 4 consecutive trials with <= 2 verbal prompts

Narrative:

Baseline: "0) Does not participate"

Narrative:

Methods(s) of Measurement: Demonstration/Performance.

Progress Reporting

Period End: **Level:** **Status:**

Comments:

Short-term Objective: c) Drew will begin to reference peers to gain information in his general education class room — Start: 04/30/08 End: 04/30/09

Checkpoint:

Criteria: >= 75 percent in 3 out of 4 consecutive trials with <= 2 verbal prompts

Narrative:

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Academic/Functional Goals and Objectives (con't)

Baseline: "0) Does not participate"

Narrative: Drew currently relies on teachers to tell him what to do in everyday classroom routines.

Methods(s) of Measurement: Demonstration/Performance.

Progress Reporting

Period End: Level: Status:
Comments:

Short-term Objective: d) Drew will learn the names of his new classmates and greet them with "Hi ____" Start: 04/30/08 End: 04/30/09

Checkpoint:

Criteria: >= 75 percent with <= 1 verbal prompts

Narrative:

Baseline: "0) Does not participate"

Narrative: Only does this with other SSN students.

Methods(s) of Measurement: Demonstration/Performance

Progress Reporting

Period End: Level: Status:
Comments:

Douglas County School District Re.1 - Instructional Support Services
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0080

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted], Endrew Robert LASID: 122655 SASID: 122655
School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Special Education, Related Services & Supplementary Aids/Services

Accommodations / Modifications:

Describe the unique accommodations/modifications necessary for the student to participate in the general education curriculum, as well as, nonacademic and extra curricular activities considering the identified needs of the student.

Visual schedule as needed, visual work system, preferential seating, movement and sensory breaks as needed, Sensory strategies including deep pressure, weighted lap pillow, heavy work, facilitate social exchanges with peers, sytematic instructional techniques. Use sensory strategies to optimize attention and arousal. Shortened assignments with visual support. Provide a specific time-out spot for Drew to calm when responding to anxiety provoking event

Service Delivery:

Specific services needed to address goals and objectives:
special education teacher, speech/language therapy, occupational therapy, Mental Health and paraprofessional support.

Special Education Services:

Service Coordinator	#2	#3	#4	#5
Type of service provider (assignment)	SSN/pcm	OT staff	MH	SL	
Projected beginning date of service	04/30/08	04/30/08	05/10/07	04/30/08	
Projected ending date of service	04/30/09	04/30/09	05/10/08	04/30/09	
Hours of Special Education Services per Week by Service Provider					
Indirect (consultation)	1	0.25	0.25	0.5	
Integrated services in general classroom	25				
Direct outside general classroom	7.5	0.5	0.5	1	
Total hours by provider	33.5	0.75	0.75	1.5	

Note: Level Matriculation info provided on Comments page.

Other IEP Services:
(such as supplementary aids and services)

Description	Hrs per week
Parent Follow-up Activities	
Preschool Integrated Education Program	

Does the student require:

Special transportation?	☒ Yes	☐ No
A literacy/modality plan? (For Vision Disability)	☐ Yes	☒ No
A communication plan? (For Hearing Disability)	☐ Yes	☒ No
A behavior plan?	☒ Yes	☐ No
A health care plan?	☒ Yes	☐ No
Assistive technology? (If yes, describe)	☐ Yes	☒ No

Extended School Year? ☒ Yes ☐ No ☐ To be determined by: _____
(Rationale for decision)
Autism Spectrum Disorder--predicted regression after long breaks. Parents declined to ESY.

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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Heritage Elementary Date of Meeting: 04/30/08

Special Education, Related Services & Supplementary Aides/Services

Recommended Placement in Least Restrictive Environment (LRE):

How much time is student only with students with disabilities? <21%

Setting Code: 302 Inside the Regular Class 40% to 79% of the Time

Why? structured drill and practice needed to apply in the general classroom

Involvement of Student in State and District Assessments:

(a) What state and district assessments of student achievement will the student be taking?

☐ CSAP ☐ CSAP-A ☐ Other:

(b) What accommodations, if any, will be provided to the student related to the administration of the assessments of student achievement?

small group/ one on one instructionsimplify verbal direction as allowed per test designwritten directions/picture cues as allowed

(c) If the student will not participate in said assessments, why not?

(d) How will the student be assessed?

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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Date of Meeting: 04/14/09

Individualized Education Program (IEP) for [redacted] Endrew Robert

Student Information

DOB: [redacted]	LASID: 122955	SASID: 6914080767	Medicaid #:
Home School: Summit View Elementary		School of Attendance: Summit View Elementary	
Grade: 3 Track: Mod.		Ethnicity: White (not Hispanic)	
Age: 9yrs 6mos Gender: M		English Language learner? ☐ Yes ☒ No	

Parent Information

Parent/Guardian	Parent/Guardian
Last Name: [redacted]	Last Name: [redacted]
First name: Joe	First Name: Jennifer
Address: [redacted]	Address: [redacted]
City: [redacted]	City: [redacted]
State: CO Zip: [redacted]	State: CO Zip: [redacted]
Home Phone: [redacted]	Home Phone: [redacted]
Work Phone:	Work Phone: [redacted]
Relationship to Student: Parent(s)	Relationship to Student: Mother
Primary Language: English	Primary Language: English

Special Education Information

Date of Initial Eligibility Meeting: 06/25/02 (month/day/year)

Date of Last IEP Review: 04/29/08 (month/day/year)

Date of Next Eligibility Meeting: 04/29/11 (month/day/year)

Date of Next Annual Review: 04/14/10 (month/day/year)

Reason for Meeting: ☐ Initial ☒ Annual ☐ *Reevaluation (Triennial) ☐ Other:

* Required for change in disability, significant change in placement, or exit from special education program

Primary Disability: Physical Disability / Autism

Setting Code: 302 (L.M.41)

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EXHIBIT 3

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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/14/09

Participants in Meeting

Initials indicate participation only

The following participants must be in attendance:
(please print name and initial if you are in attendance at the meeting.)

Jennifer [redacted]	
Student's Parent/Surrogate Parent *(unless parent decided not to attend)*	Student's Parent *(unless parent decided not to attend)*
Robin Kessel	Amy Holton
Special Education Director/Designee	Special Ed. Teacher / S/L Pathologist
Lynn Ackerman/ Marci Stacy	
General Education Teacher *(if the student is or may be participating in the general education environment)*	Student *(when appropriate)*
Ron Schumacher	
Building Principal / Designee *(for eligibility only)*	Interpreter *(when appropriate)*

Others with knowledge and expertise regarding this student:

Robin Kessel	
Speech / Language Pathologist	School Nurse
Denise Alford	
Occupational Therapist	Physical Therapist
Rochelle Evans	Nicole Breuer
School Psychologist	School Social Worker
Audiologist	School Counselor
Other *(specify area represented)*	Other *(specify area represented)*
Non-Attendee	Non-Attendee
Non-Attendee	Non-Attendee

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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/14/09

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

Background/Historical Data
(Family and medical history, patterns of strength/weaknesses in academic, social/emotional/behavioral functioning)

Evaluations Administered/Date/and/or Information Reviewed

Classroom Observation (Other than classroom teacher)	Evaluator	Date of Evaluation
Academic Skills	Evaluator	Date of Evaluation
Communication Skills	Evaluator	Date of Evaluation

Communication Rating: V = 1 F = 1 A = 1 L = 1 Total CRS = OR FC =
Comment: _____

Cognitive Functioning	Evaluator	Date of Evaluation
Social/Emotional/Behavioral Functioning	Evaluator	Date of Evaluation
Physical	Evaluator	Date of Evaluation
Health Status	Evaluator	Date of Evaluation

Results of vision screening: _____
Results of hearing screening: _____
Health Care Plan?: _____
How does it relate to the suspected disability?: _____

Interpretation of Results:
(Include interpretation of the above data as well as information regarding student growth/progress. For eligibility meetings, include conclusions about the RtI that is documented above.)

Present Level of Educational and Functional Performance
(How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?)

Educational Needs

(Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?)

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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/14/09

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

Educational

Evaluations Administered/Date and/or Information Reviewed *Include classroom observation other than classroom teacher.*	Name of Evaluator	Date
	Amy Holton	*04/14/09*

Drew has had to adjust to a new school and friends this year. He is currently served in both the general education setting (with significant support) and self-contained SSN room.

Reading: Comprehension continues to be an area of struggle for Drew. He often needs prompting and redirection. He benefits from reading a story at least twice and using visual support to help him gain knowledge. Drew draws upon his interest and prior knowledge to comprehend so it benefits him to read along subjects that interest him. Drew stays engaged in his reading in a 1 on 1 setting.

Writing: Writing tasks have to be broken down to small steps using visual support. Drew often needs a great deal of prompts to write. This is best accomplished in a 1 on 1 setting.

Math: This area continues to be a strength for Drew. He is strong with his computation skills (addition more than subtraction) and often used this as a way to calm down. As more language is introduced into the math curriculum Drew continues to need more support. He is working on word problems in the SSN room in a small group setting.

In the self contained SSN class, Drew is working on his independence with academic tasks. He is also working on more whole class and small group instruction. In the SSN room, Drew can work in a whole class setting successfully with 6-8 other students and a small group with 2-3 others.

Drew's sensory needs and behavior continue to be of concern. He has begun to make his sensory needs known to his teachers however, he also uses these requests to avoid working. Often Drew goes through a variety of behaviors to avoid work.

Currently Drew is involved with his general education classroom at the beginning of the day, read aloud time and for specials and recess/lunch. Mrs. Stacy, his general education teacher, has reported that Drew has had times throughout the year when he is on task and productive in the classroom. At these times he is quiet and respectful to others around him. Drew works well for rewards and when he has clear expectations. Drew has been involved with oral reading without paraeducator support (the para is in the hall without his knowledge). This has been positive on most occasions if he has enough activities such as math facts or puzzles to keep him busy. There are times when Drew has either decided not to do such activities or has finished these activities and became disruptive. Drew's behavior often is unpredictable and will change without warning. Drew is often redirected by his special education teacher or paraeducator in the class setting. If he is not continually busy or immediately given another activity he becomes disruptive. His disruptive behavior is often yelling out, walking around scripting computer games, etc. There are times when he has been removed from the class due to crawling under desks, slapping the computer screen, or being disrespectful to his peers by messing with their work or desk. Some areas of concern are Drew's tendencies to wander out of the room without supervision, his unpredictable behavior which warrants a need to be removed from the class, and his behavior before school when the class is lining up for the bell to ring.

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/14/09

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

continued

Present Level of Educational and Functional Performance

How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

Drew's disability impacts his independence in the general classroom. He is highly distractable and needs a lot of structure and consistency. Drew needs small group instruction, visual cues, prompts and he benefits from repetition and tasks broken down into small steps in order to access the general curriculum.

☐ Not a current area of concern due to existing information (If appropriate, please check)

Educational Needs:

Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?

Continue to strengthen all areas of academics especially in reading comprehension and writing, gain stronger social skill, increase independence.

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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/14/09

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

Communication

Evaluations Administered/Date and/or Information Reviewed	Name of Evaluator	Date
Language of evaluation if other than English:	Robin Kessel,MA CCC-SLP	04/08/09

Current information is based upon:
File Review
Observation
Data Collection/Informal assessments
Consultation with Staff

Drew's primary mode of communication is verbal. Drew's expressive language is characterized primarily by short phrases and simple sentences. He has shown growth in his use of eye contact, and will specifically look to an adult if he needs clarification or assistance. When prompted, Drew is able to maintain eye contact through up to 2-3 conversational turns with an adult. Recently, Drew has been observed initiating conversation using appropriate eye contact when he is sitting in close proximity to an adult and wants to share something (usually about a movie or computer game). In these instances, he typically does not continue in conversational turn taking beyond his initial contribution. Similar behaviors are not observed with peers. When conversational exchanges are modeled for him, Drew is able to imitate, but spontaneous use of commenting or questioning in response to a conversational exchange has not been observed. Drew will respond correctly to direct questions that have factual, concrete answers, most of the time, but experiences much more difficulty with Why or How questions as well as with open ended questions that involve personal preferences, opinions or relating events. Drew does have more success responding to these types of questions when given two choices from which to pick his preference. Drew is also successful with verbally communicating his needs for sensory breaks and rewards for work completion. Informal assessments of vocabulary indicate adequate development. Drew is able to point to and label a variety of pictured objects and actions without difficulty. His knowledge of basic concepts is inconsistent. On a recent assessment, he was able to correctly answer questions containing the following concepts: behind, above, beneath, inside, and over. He struggled the concepts of: between, under, in front, and beside. .

Drew's speech production is characterized by sound substitutions on the /l/, /r/, and /th/ sounds. He is able to produce a modified production of the /l/ sound with his tongue placed interdentally, between his upper and lower teeth, rather than elevated behind his upper teeth. Attempts to transition his tongue placement to the correct spot have been unsuccessful to date. While these errors are noticeable in his speech, they do not impact his intelligibility to such a degree that listeners are not able to understand him. Drew also experiences difficulties regulating his volume. When he appears to be anxious or agitated, his volume significantly increases. Drew does seem to understand the differences between inside/outside voice and quiet/loud voices, but has difficulties modulating his volume without prompting.

Drew's primary weakness in the communication area at this time is with social language skills.

Communication Rating: V = 0 F = 0 A = 2 L = 3 Total CRS = 4 OR FC = 3

Comment: Drew has a mild articulation delay and a moderate functional communicative disability.

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Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 6914080787
School of Attendance: Summit View Elementary Date of Meeting: 04/14/09

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

continued

Present Level of Educational and Functional Performance

How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

Language deficits impact Drew's ability to establish and maintain social relationships. Difficulties communicating his intent and responding to direct requests further impact his ability to access the general education curriculum with direct support and specialized intervention.

☐ Not a current area of concern due to existing information (If appropriate, please check)

Communicative Needs:

Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?

To improve pragmatic/social language skills

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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/14/09

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

Pertinent Family Information

Evaluations Administered/Date and/or Information Reviewed *Include adaptive behavior for student with suspected SLIC disability.*	Name of Evaluator	Date
	Caroline Waddell L.C.S.W	04/30/08

No updated Information in the areas of family, health (see nurse's report) or Instructional Support Services. Jennifer's main request is more support in the areas of mental health. Because Drew is a sensory child, she suggests a recess group where upon he could sign up with one buddy per week to play with. This would need to be monitored by an adult. He enjoys physical sensory type things such as hide and seek or playing the game tag. All of his interactions would not need to be question driven with his peers. The focal point would be the involvements/ interactions at recess.

Also, if the schedule permits, Drew could follow recess with the same buddy or buddies to have lunch. Again this would need to be guided by an adult to foster conversation (most likely about the events of recess). Repetition will be key for Drew to establish a social routine.

Mental health support could also include a small group inside upon focusing on eye contact, turn-taking, game-playing and even possible social stories.

05/20/05
Home visit with Mrs. [redacted] record review, team consultation Drew has been attending preschool at the Rock Canyon site 4 days/wk and enjoys going to school. This is Drew's third year with the preschool program. Mrs. [redacted] continues to be pleased with Drew's developmental progress. He is typically using 3 word phrases (and some 4 word phrases) to convey his needs/wants (e.g., "mommy, sit down"). Drew's mom feels the ideas that he is able to verbalize have expanded and become more complex. He is also doing more verbal commenting during his play. In the area of language, the [redacted] top current priority is Drew's articulation errors which increase when he is excited and talking rapidly. Drew seems to be more receptive to interactions with peers and now his family would like to see him using his language in these social interactions. Drew continues to enjoy and do well with gross motor activities and has less interest in the fine motor activity of writing. Drew is able to write his name and draw some simple shapes; his mom remains concerned about his tool grip. Drew continues to participate in private treatment that includes 9 hrs/wk of home training and 3 hrs/wk of an integrated play group with Annette Nunez. Since 10/04 Drew has been taking Ritalin and his mom feels it has decreased his impulsivity and improved his body control. The Vineland Adaptive Behavior Scales was completed with Mrs. [redacted] to assess Drew's adaptive skills and yielded the following results:DOMAIN

	STANDARD SCORE	PERCENTILE RANK	ADAPTIVE
LEVELCommunication	72		3
	Mod. LowDaily Living Skills		64
		1	
LowSocialization		68	
	2	LowMotor Skills	
	84		14
	Mod. LowOverall Composite		66
	1		LowDrew's overall adaptive skills are

at the 1st percentile when compared to peers which is consistent with a diagnosis of Autism Spectrum

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/14/09

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

continued

Disorder. Mrs. [redacted] has noticed some increased rigidity from Drew recently around having to take the same route to school and get out of the car on a specific side and hopes he can gain some more flexibility. Mrs. [redacted] is eager to learn more details about Drew's transition to kindergarten including what steps can be taken to increase Drew's success in his process and what schedule will be utilized to help him with the routine in the new setting. The [redacted] have been terrific advocates for Drew's educational needs and proactive in utilizing school, private and community resources to support Drew's progress.

Present Level of Educational and Functional Performance

How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

Mrs. [redacted] feels Drew's limited communication and social skills will continue to require adult support in order for him to maximize learning and participation in the classroom setting. The family greatly values frequent communication between school and home to support Drew's progress.

☐ Not a current area of concern due to existing information (If appropriate, please check)

Needs:

Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?

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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/14/09

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

Social/Emotional

Evaluations Administered/Date and/or Information Reviewed *Include adaptive behavior for student with suspected SLIC disability.*	Name of Evaluator	Date
	R. Evans/N Breuer	*04/14/09*

Drew has been attending a daily "Lunch Bunch" with two of his classmates. The classmates daily rotate who will share lunch with Drew. The group is facilitated by an adult. The adult will prompt either Drew or the peer to ask basic questions; such as; "What are you having for lunch?" or; "What did you do this weekend?". Drew has attended in reciprocal conversation overall approximately 25% of the time, this could be due in part to the loudness of the lunch room and children having to yell over one another. The group has been somewhat successful in that Drew is expected to ask his peers questions. It will be important to continue working on generalized eye contact so that his peers feel he is listening to them.

5-15-05. Drew has made steady progress in this area. He transitions into class easily. He will occasionally greet peers using their name however, often without purposeful intention. Drew seems to enjoy taking turns with his friends and will at times request a turn or offer a turn independently. This seems to depend on the toy he is playing with and his motivation for the toy. During play, Drew continually requires prompting to stay focused and attentive. His play is mainly single step play and can be perseverative at times. He is able to link 2-3 steps in play when the motivation is high. Drew attends and enjoys an integrative play group several times per week and progress has been reported. Drew enjoys recess time however needs a visual schedule to explore other playground equipment. He prefers to stay in the playhouse and will interact with others if they are inside the house with him.

Present Level of Educational and Functional Performance
How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

Drew has made some progress in the social/emotional domain this past year. He is able to initiate simple conversation with some adults and peers in the SSN room, but has difficulty generalizing these skills to the general education classroom and with typical peers. When he is in the general education classroom, he can be easily distracted both internally and externally, which affects his academic progress and his socialization with others. Drew works best with structure and consistency and is most successful when these are in place in his environment. He currently has a para with him when he is in the general education classroom to help him stay on task.

When Drew is in social situations, such as lunch, morning routine, or recess, he is able to follow the lead of another student, but is not able to initiate an interaction independently. He has improved with maintaining joint attention with a peer and with eye contact, but this is often directed and prompted by an adult. He appears more motivated to interact with other students than he has in the past, but continues to struggle with maintaining an appropriate conversation and with following social norms. When Drew is upset, it is more difficult for him to work with others and to complete his tasks. His successes often depend upon his emotional state.

☐ Not a current area of concern due to existing information (If appropriate, please check)

Social/Emotional Needs:
Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?

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Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/14/09

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

continued

Improve independence with social interactions and academic work
Decrease anxiety
Increase reciprocal peer interactions and length of social exchanges

Douglas County School District Re 1 - Instructional Support Services
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0080

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/14/09

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

Cognitive

Evaluations Administered/Date and/or Information Reviewed *Include adaptive behavior for student with suspected SLIC disability.*	Name of Evaluator	Date
	H. Redford, Ed.S.	04/29/08

The School Function Assessment (SFA) is used to measure a student's performance of functional tasks that support his/her participation in academic and social aspects in school grades K-6. The SFA is comprised of 3 parts:

Part 1-Participation. Examines a student's level of participation in 6 major school settings: regular or special ed classroom, playground/recess, transportation to/from school, bathroom, transition to/from class and mealtime.

Part 2-Task Supports. Examines the supports provided when the student performs school related activities. The 2 types of supports examined are: Assistance (adult help), and Adaptations (modifications to the environment) such as adapted materials or specialized equipment.

Part 3-Activity Performance. Examines the student's performance on specific school related functional activities. Activities include: Functional Communication, Memory and understanding, Following social conventions, Compliance with directives and school rules, Task completion, Positive interaction, Behavior regulation, Safety and Personal care awareness.

Drew was rated by his SSN one to one aid. Drew requires Extensive to Moderate assistance and adaptations on all cognitive/behavioral tasks with the exception of the memory and understanding area where he needs only minimal assistance and adaptations.

Drew is able to communicate yes/no, acceptance/refusal or a choice between two or more items with consistent performance. On the other hand, he rarely advocates for himself when he needs help with a functional academic tasks such as opening a container or where he would go if he were lost.

Drew's personal strength is in the area of memory and understanding. For example, he is able to remember daily routines and basic one step directions such as stop, come here and get book with consistent performance. Additionally, Drew cocsistently demonstrates an ability to follow a series of three or more related instructions (such as put things away, put on your coat, and line up).

Drew is inconsistent in the area of following social conventions. For example he will often use words such as please, thank you and sorry when appropriate but does not recognize how and when to communicate private matters such as a toileting accident.

Compliance with adult directives and school rules are significantly below that of same aged peers. While Drew generally will observe rules around movement around the classroom/school, when he is in a state of obsession/compulsion usually around timers and watches, he has difficulty responding to redirection and will not stop immediately when instructed to do so.

Drew requires significant assistance from others to maintain his safety, task completion, personal care and behavioral regulation.

The Universal Nonverbal Inteligence test (UNIT) was attempted with Drew. The examiner is not allowed to use words to demonstrate the tasks. While Drew picked up on many of the nonverbal gestures such as wait and begin, his attention to task and fleeting eye contact made his subtest score invalid.

5-15-05. Classroom observation, review of records, update of information from teacher, Kaufman Brief

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Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

continued

*Intelligence Test (K*BIT). In February of 2004, Drew's cognitive development was evaluated at the request of his mother and pediatrician (please see separate report). At that time, the Differential Ability Scale (DAS) was attempted but only partially successful. In the classroom, Drew's behavior and attention was nicely developed for familiar tasks and his behavior during testing was atypical for him, but indicative of being taken out of his routine and presented with novel tasks. Drew participated with the verbal items but his attention and behavior prevented completion of the nonverbal items. Verbally on the DAS, Drew's concept knowledge (Naming Vocabulary T = 33) was significantly stronger than his understanding of more abstract verbal information (Verbal Comprehension T=24) and his overall verbal thinking skills were significantly delayed for his age (Verbal SS = 64). Understanding relationships in pictures was challenging for Drew as well (Picture Similarities T=24). Drew's direct matching skills were strong but matching based on similarities or simple categories was a challenge for him. The Developmental Observation Checklist System (DOCS) was completed by Drew's teachers to determine the validity of the DAS. Drew's cognitive development, as reported by his teachers responses on the DOCS, continued to show a pattern of significant delay (SS=64) that was consistent with the DAS and approximated the 23 month age level. Although his scores were more indicative of a 2 year old, Drew's teachers felt that with facilitation and a familiar routine, his functioning in the classroom was more like a new 3 year old. Currently, Drew is functioning within the Below Average range of intelligence at the 8th percentile (SS=79) on the K*BIT. His true score should fall within the range of 69-89 with 95% accuracy. This is somewhat improved from his performance last year on the DAS and the DOCS, which may be attributed to his being on Ritalin. Drew's vocabulary knowledge was Below Average (SS=75), as were his nonverbal reasoning skills (SS=87). Although on Ritalin, Drew was extremely distractible during this assessment, which negatively impacted his performance. He appeared stressed to be out of his class and routine, often looking into the class and repeating whatever was being said in class. Even given his distraction, this appears to be a fairly accurate estimate of Drew's current level of thinking based on his classroom performance and teacher report.*

Present Level of Educational and Functional Performance

How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

Drew's thinking skills are impacted by his language delays and attention. He learns and performs best within a structured and familiar routine given visual cues. Generalizing his skills to different settings continues to be challenging for him.

☐ Not a current area of concern due to existing information. (If appropriate, please check)

Cognitive Needs:

Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?

**Improve attention and verbal thinking.*

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Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

Current Health Evaluation - Nurse

Evaluations Administered/Date and/or Information Reviewed *Include classroom observation other than classroom teacher.*	Name of Evaluator	Date
	W. Pepper RN BSN	04/13/09

4/13/09 Annual update. Information obtained from mother, Jennifer [redacted] as well as from files reviewed. See previous report below. Drew has been diagnosed with autism, ADHD, and severe allergies to nuts and peanuts. Currently, Drew's daily medications are Concerta and Lexapro. Epi pen jr has been prescribed to be given as needed for severe allergic reactions. Mother reports that the side effects he experiences from Concerta and Lexapro include diminished appetite and sleep disruptions. (Medications are per physician and subject to change without notice.) Distractibility, difficulty maintaining attention and focus and disruptive behaviors are areas of concern. Social interaction and communication issues persist. Se attached health care plans. W.Pepper RN BSN

4/28/08 Reviewed school records, IEP reports, and the health information update form completed by Jennifer [redacted] mother. No significant medical concerns reported regarding the pregnancy or Drew's birth. Mom notes that Drew experienced some speech delays. Drew has been diagnosed with Autism (2001) and ADHD (2005). He is currently taking Lexapro, Focalin and guanfacine daily. Mom reports that side effects Drew has experienced include some sleep disruptions. Mom also notes that Drew has some anxiety. Additionally, Drew has seasonal allergies. Drew has very good school attendance. Unable to screen for vision at school. No concerns in the classroom regarding vision. Hearing tested by district audiologist. K. Mueller RN,BSN

Present Level of Educational and Functional Performance:
How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

Drew's symptoms of Autism including limited social interactions and ADHD including inattention and distractibility impact his ability to access the general curriculum. See IEP reports for current academic progress. Severe allergies to peanuts and nuts should not be a problem provided he avoids them.

☐ Not a current area of concern due to existing information (If appropriate, please check)

Health Needs:
Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?

Drew needs to work on developmentally appropriate attention, social and communication skills in order to better access the general school curriculum

- Results of vision screening: *unable to test at school. No reported vision concerns*
- Results of hearing screening: _____
- Health care plan? *yes*
- How does it relate to the suspected disability? *see attached*

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Physical Motor/Other Health Related

Evaluations Administered/Date and/or Information Reviewed *Include classroom observation other than classroom teacher.*	Name of Evaluator	Date
	Denise O. Alford MS, OTR	*04/14/09*

Records reviewed including previous testing. Within the past year, Drew has been seen 1-2 days a week both individually and in a group to focus on his sensory processing, fine motor, visual motor, and gross motor skills. Drew has made some progress in all areas.

A variety of sensory strategies have been provided to the SSN staff and a demonstrated how to use them effectively. Drew has scheduled sensory breaks within his school days plus is provided with other sensory breaks as needed throughout the day. Drew will often seek deep pressure, neutral warmth, and chewing to reorganize himself internally. Some of his preferred activities are having a therapy ball rolled on him, wrapping himself in a sleeping bag, chewing thera-tubing, and joint compressions. At times, he will run to get the "equipment" without any prompting from the staff. Tasks that require more effort from Drew often cause him to be more off task and yelling out, having others question whether or not he uses sensory breaks as avoidance. Higher levels of anxiety negatively impact sensory processing and he will need more sensory input. Drew demonstrates the need for excessive amounts of sensory input in order to increase his ability to function within the academic setting. Every spring, Drew seems more disorganized and requires more sensory breaks and more intense sensory input. His sensory integration is evident in by his distractibility, constant need for fidgeting or movement, and need to touch things. Loud noises including in the cafeteria, parties, and assemblies can cause Drew distress and he will begin to wander or yell out.

Drew has fine motor and visual motor skills that are functional for the academic environment when he is able to focus on the paper for more than a few seconds at a time. He is very easily distractible and requires constant cue to look at what he is cutting or writing. The rate of speed at which he completes many tasks, is fast which negatively impacts his performance. When writing he is able to use uppercase and spaces appropriately, but legibility is variable with his attention. Drew is effective using a mouse and can hunt and peck to complete sentences. A word prediction program, Co-Writer, was introduced but he is more efficient keyboarding without it.

Drew has demonstrated an increase in his balance and motor planning this year along with a small increase in his postural control. In general he is very low tone, and at times lays on his desk but is able to maintain a more appropriate posture than previously.

Drew continues to benefit from direct occupational therapy services to improve his sensory processing, visual motor skills, and written communication/ keyboarding.

Present Level of Educational and Functional Performance
How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

Providing structure improves Drew's performance in his motor activities. Attention to task impacts his ability to perform at his highest level. Drew benefits from sensory activities to help him organize himself internally. Since visual perception is a strength for him, using visual cues, picture schedules and cues to break the tasks down increases his performance.

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Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

continued

☐ Not a current area of concern due to existing information (If appropriate, please check)

Physical Motor/Other Health Related Needs

Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?

Drew needs to improve his sensory skills and motor skills as related to academics

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Determination of Eligibility and Disability

(This section completed only for eligibility meetings)

Have sufficient and appropriate evaluations been completed, documented, or considered to determine the presence of an educational disability? ☒ Yes ☐ No

If not, obtain additional information and reconvene the meeting.

(This section completed only for eligibility meetings.)

Does the student have a disability as defined in the State Rules for the Administration of the Exceptional Children's Education Act? *(complete and attach appropriate checklist)* ☒ Yes ☐ No

If no, terminate the meeting.

(This section completed for all meetings.)
If the student has a disability, the disability is.
(If more than one disability is determined, the primary disability should be identified with a 1, the secondary disability with a 2.

- ☐ 01 Significant Limited Intellectual Capacity
- ☐ 03 Significant Identifiable Emotional Disability
- ☐ 04 Specific Learning Disability
- ☐ 05 Hearing Disability *(requires communication plan)*
- ☐ 06 Vision Disability *(requires literacy plan)*
- ☐ 08 Speech or Language Impairment
- ☐ 11 Preschool Child with a Disability

Physical Disability

- ☐ 14 Traumatic Brain Injury
- [1] 13 Autism
- ☐ 07 Other Physical Disability
  - ☐ Check if physical disability due to ADD/ADHD.

Multiple Disabilities

- ☐ 09 Deaf-Blind
- ☐ 10 Multiple Disabilities with Cognitive Impairment

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Academic/Functional Goals and Objectives

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the extent of nondisabled children.

Annual Goal: *1. The student will Demonstrate the ability to read and comprehend a variety of instructional-leveled texts, as measured by the following objectives:*

Standard/ Access Skill: *Language Arts, 4*

Short-term Objective: *a) Given text at an instructional level, Drew will read a passage and retell it in logical sequence.* Start: 04/14/09 End: 04/14/10

Checkpoint: *4 - 6 (4.2): Uses a variety of strategies (e.g., asking questions, drawing conclusions, using clues from text to support generalizations, distinguishing between fact/opinion and cause/effect) to comprehend narrative and expository text.*

Criteria: *>= 80 percent in 4 out of 4 consecutive trials*

Narrative:

Baseline: *>= 80 percent in 3 out of 4 consecutive trials with >= 5 verbal prompts*

Narrative: *Drew currently needs multiple prompts to retell a story. He often fixates on one detail of the story and answers all questions using that detail.*

Methods(s) of Measurement: *Written performance, Oral performance.*

Progress Reporting

Period End: *06/19/09* Level: *3* Status: *Will be continued (C).*
Comments: *Working hard on this objective. He is enjoying the Magic Tree House series.*

Period End: *11/12/09* Level: *3* Status: *Will be continued (C).*
Comments: *Drew is still working with the Magic Tree House series. His retell has become stronger due to the consistency of the series.*

Period End: *03/08/10* Level: *3* Status: *Will be continued (C).*
Comments: *Drew can tell the beginning and ending of a story but still needs prompts to understand "middle".*

Period End: *04/08/10* Level: *3* Status: *Is no longer appropriate (NA).*
Comments:

Short-term Objective: *b) Given a text at an instructional level, Drew will be able to answer why and how questions as it relates to the information read.* Start: 04/14/09 End: 04/14/10

Progress Key:
1. Skill / behavior is rarely or never demonstrated, therefore incomplete positive data is available.
2. Skill / behavior is inconsistent with frequent prompts and is below expectations of plan.
3. Skill / behavior is consistent over time with few prompts and meets expectations of plan.
4. Skill / behavior is generalized and transferred without prompts and is above expectations of plan.

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Academic/Functional Goals and Objectives (con't)

Checkpoint: *4 - 6 (4.2): Uses a variety of strategies (e.g., asking questions, drawing conclusions, using clues from text to support generalizations, distinguishing between fact/opinion and cause/effect) to comprehend narrative and expository text.*

Criteria: *>= 80 percent in 4 out of 4 consecutive trials*

Narrative:

Baseline: *<= 80 percent in 3 out of 4 consecutive trials with >= 5 verbal prompts*

Narrative: *Drew can make some predictions with lower level text. He has not begun making inferences in text.*

Methods(s) of Measurement: *Written performance, Oral performance.*

Progress Reporting

Period End: *06/19/09* Level: *3* Status: *Will be continued (C).*
Comments: *Still needing a lot of guidance with comprehension.*

Period End: *11/12/09* Level: *3* Status: *Will be continued (C).*
Comments:

Period End: *03/08/10* Level: *3* Status: *Will be continued (C).*
Comments: *Drew does better answering why in non-fiction literature. He still needs prompts to understand why in most stories he reads.*

Period End: *04/08/10* Level: *3* Status: *Is no longer appropriate (NA).*
Comments:

Short-term Objective: *c) Given an instructional level text, Drew will apply a variety of strategies to decode unfamiliar words.* Start: *04/14/09* End: *04/14/10*

Checkpoint: *4 - 6 (4.2): Uses a variety of strategies (e.g., asking questions, drawing conclusions, using clues from text to support generalizations, distinguishing between fact/opinion and cause/effect) to comprehend narrative and expository text.*

Criteria: *>= 80 successes in 4 out of 4 consecutive trials*

Narrative:

Baseline: *<= 50 successes in 3 out of 4 consecutive trials with <= 3 verbal prompts*

Narrative:

Methods(s) of Measurement: *Written performance, Oral performance, Demonstration/Performance.*

Progress Reporting

Period End: *06/19/09* Level: *3* Status: *Will be continued (C).*
Comments:

Period End: *11/12/09* Level: *3* Status: *Will be continued (C).*
Comments: *Currently we are working to break down words into syllables.*

Period End: *03/08/10* Level: *3* Status: *Will be continued (C).*
Comments: *When pushed Drew can sound out most of his words. He needs to believe he can and not*

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Academic/Functional Goals and Objectives (con't)

ask for the word before he tries.

Period End: 04/08/10 Level: 3 Status: Objective complete (OC).
Comments:

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School of Attendance: Summit View Elementary Date of Meeting: 04/14/09

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the extent of nondisabled children.

Annual Goal: *2. The student will improve writing skills as measured by the following objectives:*
Standard/ Access Skill: *Language Arts, 3*

Short-term Objective: *a) With a visual cue Drew will be able to write a 5 sentence paragraph with a beginning, 3 sentence body and conclusion sentence.* Start: 04/14/09 End: 04/14/10

Checkpoint: *K - 3 (3.1): (Organization/Content) Organizes single-paragraph writing in a manner that develops and supports main ideas with relevant details.*

Criteria: *>= 5 sentences in 4 out of 4 consecutive trials*

Narrative:

Baseline: *<= 5 sentences in 3 out of 4 consecutive trials with >= 5 verbal prompts*

Narrative:

Methods(s) of Measurement: *Written performance.*

Progress Reporting

Period End: *06/19/09* Level: *3* Status: *Will be continued (C).*
Comments: *This all depends on his desire!*

Period End: *11/12/09* Level: *3* Status: *Will be continued (C).*
Comments:

Period End: *03/08/10* Level: *3* Status: *Will be continued (C).*
Comments: *Drew has been working on pulling out details in his writing to give the reader a better picture.*

Period End: *04/08/10* Level: *3* Status: *Objective complete (OC).*
Comments:

Short-term Objective: *b) Drew will produce legible written work within the lines of standard notebook paper.* Start: 04/14/09 End: 04/14/10

Checkpoint: *K - 3 (3.3): (Conventions) Produces a legible product using conventions for writing such as punctuation, capitalization, standard spelling, and grammar.*

Criteria: *"4) Performs activity without support in 4 out of 4 consecutive trials*

Narrative:

Baseline: *"3) Performs activity with verbal/gestural cues"*

Narrative: *Drew currently needs mulliple reminders to produce legible writing within the lines.*

Methods(s) of Measurement: *Demonstration/Performance.*

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Academic/Functional Goals and Objectives (con't)

Progress Reporting

Period End: 06/19/09 Level: 3 Status: Will be continued (C).
Comments: Still needing a lot of prompts to stay in the lines.

Period End: 11/12/09 Level: 3 Status: Will be continued (C).
Comments: This depends on Drew's desire.

Period End: 03/08/10 Level: 3 Status: Will be continued (C).
Comments: Drew is capable of this if he desires.

Period End: 04/08/10 Level: 3 Status: Objective complete (OC).
Comments:

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Academic/Functional Goals and Objectives (con't)

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Annual Goal: *3. The student will communicate an understanding of number sense as measured by the following objectives:*

Standard/ Access Skill: *Mathematics, 1*

Short-term Objective: *a) Given a variety of coins and dollars, Drew will accurately count money up to $5.00 and then hand over the correct amount counted.* Start: 04/14/09 End: 04/14/10

Checkpoint: *4 - 6 (1.1): Understands value as it relates to positive rational numbers (e.g., 3/4, 1/3, 2/1, 0.75), including terminating decimals through hundredths, commonly-used fractions (i.e., halves, thirds, fourths, fifths, eighths, tenths), mixed numbers, and percents.*

Criteria: *>= 90 percent in 4 out of 4 consecutive trials*

Narrative:

Baseline: *>= 75 percent in 3 out of 4 consecutive trials with >= 3 verbal prompts*

Narrative: *Drew can count money with a variety of coins but is inconsistent.*

Methods(s) of Measurement: *Oral performance, Demonstration/Performance.*

Progress Reporting

Period End: *06/19/09* Level: *3* Status: *Will be continued (C).*
Comments: *Drew is doing well with adding money. He really enjoys it!*

Period End: *11/12/09* Level: *3* Status: *Will be continued (C).*
Comments:

Period End: *03/08/10* Level: *3* Status: *Will be continued (C).*
Comments: *Drew enjoys working with money and is doing a great job with it!*

Period End: *04/08/10* Level: *3* Status: *Will be continued (C).*
Comments:

Short-term Objective: *b) When identifying an object Drew wishes to purchase, he will be able to answer the question, "Is that enough?".* Start: 04/14/09 End: 04/14/10

Checkpoint: *4 - 6 (1.5): Uses oral/written language to communicate an understanding of number sense.**

Criteria: *>= 80 percent in 4 out of 4 consecutive trials*

Narrative:

Baseline: *<= 50 percent with >= 3 verbal prompts*

Narrative:

Methods(s) of Measurement: *Demonstration/Performance.*

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Academic/Functional Goals and Objectives (con't)

Progress Reporting

Period End: 06/19/09 Level: 2 Status: Will be continued (C).
Comments: Drew is just beginning to work on this objective.

Period End: 11/12/09 Level: 3 Status: Will be continued (C).
Comments: Drew needs a lot of prompts to accomplish this.

Period End: 03/08/10 Level: 3 Status: Will be continued (C).
Comments: Drew is can answer this question when it is asked in a paper/pencil task, however he struggles when it is a verbal cue. Often he is looking at the teachers face for the answer or a clue to the answer.

Period End: 04/08/10 Level: 3 Status: Will be continued (C).
Comments:

Short-term Objective: c) Drew will understand time related vocabulary and concepts as it realtes to the calendar. Start: 04/14/09 End: 04/14/10

Checkpoint: 4 - 6 (1.5): Uses oral/written language to communicate an understanding of number sense.*

Criteria: >= 80 percent in 4 out of 4 consecutive trials

Narrative:

Baseline: <= 70 percent in 3 out of 4 consecutive trials with >= 3 verbal prompts

Narrative: Drew will be working on the language associated with the calendar such us, "day before yesterday", "2 weeks from tomorrow", " on the 15th", etc.

Methods(s) of Measurement: Demonstration/Performance.

Progress Reporting

Period End: 06/19/09 Level: 3 Status: Will be continued (C).
Comments:

Period End: 11/12/09 Level: 3 Status: Will be continued (C).
Comments:

Period End: 03/08/10 Level: 3 Status: Will be continued (C).
Comments: Again Drew is able to do this better in a paper/pencil task than verbally.

Period End: 04/08/10 Level: 3 Status: Objective complete (OC).
Comments:

Short-term Objective: d) Given an analog clock, Drew will be able to tell the correct time. Start: 04/14/09 End: 04/14/10

Checkpoint: 4 - 6 (1.5): Uses oral/written language to communicate an understanding of number sense.*

Criteria: >= 90 percent in 4 out of 4 consecutive trials

Narrative:

Baseline: >= 75 percent in 3 out of 4 consecutive trials

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Academic/Functional Goals and Objectives (con't)

Narrative: Drew needs to become more consistent and straighten his time skills.

Methods(s) of Measurement: Demonstration/Performance.

Progress Reporting

Period End: 06/19/09 Level: 3 Status: Will be continued (C).
Comments: Drew is doing a good job with telling time. We are now working on using time in word problems.

Period End: 11/12/09 Level: 3 Status: Will be continued (C).
Comments:

Period End: 03/08/10 Level: 3 Status: Will be continued (C).
Comments: Drew is able to tell time. He needs to slow down and remember to look at the short/long hands and think what it means first.

Period End: 04/08/10 Level: 3 Status: Objective complete (OC).
Comments:

Short-term Objective: e) Given a word problem, Drew will be able to identify which operation (addition, subtraction, multiplication or division) to use to solve the problem. Start: 04/14/09 End: 04/14/10

Checkpoint: 4 - 6 (1.5): Uses oral/written language to communicate an understanding of number sense.*

Criteria: >= 80 percent in 4 out of 4 consecutive trials

Narrative:

Baseline: <= 75 percent in 3 out of 4 consecutive trials with >= 3 verbal prompts

Narrative: Drew is currently working on addition and subtraction.

Methods(s) of Measurement: Written performance, Oral performance, Demonstration/Performance.

Progress Reporting

Period End: 06/19/09 Level: 3 Status: Will be continued (C).
Comments: He is starting to understand using addition and subtraction in word problems but still needs assistance.

Period End: 11/12/09 Level: 3 Status: Will be continued (C).
Comments:

Period End: 03/08/10 Level: 3 Status: Will be continued (C).
Comments: Drew can apply addition and subtraction to word problems with prompts. He has not worked on multiplication or division.

Period End: 04/08/10 Level: 3 Status: Will be continued (C).
Comments:

Short-term Objective: f) Drew will learn his multiplication facts 6-10. Start: 04/14/09 End: 04/14/10

Checkpoint: 4 - 6 (1.3): Understands basic mathematical properties (e.g., 2 + [3 + 4] = [2 + 3] + 4, 12 ÷ 2 ' 2 = 12) and how they apply to whole and rational numbers.

Criteria: >= 85 percent in a time period of <= 10 min(s)

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Academic/Functional Goals and Objectives (con't)

Narrative:

Baseline: <= 75 percent in a time period of >= 10 min(s)

Narrative: Drew currently knows 0-5 facts.

Methods(s) of Measurement: Demonstration/Performance.

Progress Reporting

Period End: 06/19/09 Level: 3 Status: Will be continued (C).
Comments: He only wants to work on the ones he knows.

Period End: 11/12/09 Level: 3 Status: Will be continued (C).
Comments:

Period End: 03/08/10 Level: 3 Status: Will be continued (C).
Comments: Drew can do 6 and 10. He is slower at 7-9 and that frustrates him.

Period End: 04/08/10 Level: 3 Status: Will be continued (C).
Comments:

Short-term Objective: g) Drew will learn his division facts 0-5. Start: 04/14/09 End: 04/14/10

Checkpoint: 4 - 6 (1.3): Understands basic mathematical properties (e.g., 2 + [3 + 4] = [2 + 3] + 4, 12 + 2 ' 2 + 12) and how they apply to whole and rational numbers.

Criteria: >= 85 percent in a time period of >= 10 min(s)

Narrative:

Baseline: <= 50 percent

Narrative: Drew has not yet learned division.

Methods(s) of Measurement: Written performance.

Progress Reporting

Period End: 06/19/09 Level: 3 Status: Will be continued (C).
Comments: Just beginning...

Period End: 11/12/09 Level: 2 Status: Will be continued (C).
Comments: Have focused more on mastering multiplication.

Period End: 03/08/10 Level: 2 Status: Will be continued (C).
Comments: Still working on multiplication.

Period End: 04/08/10 Level: 2 Status: Will be continued (C).
Comments:

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/14/09

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the extent of nondisabled children.

Annual Goal: *4. The student will demonstrate basic language and communication skills in order to access the general education curriculum as measured by the following objectives:*

Standard/ Access Skill: *Communication and Basic Language Skills*

Short-term Objective: *a) Drew will demonstrate understanding of temporal and position concepts contained in oral/written instructions, by successfully following the directions.*

Start: 04/14/09
End: 04/14/10

Checkpoint:

Criteria: *"4) Performs activity without supports." in 5 out of 5 consecutive trials*

Narrative:

Baseline: *"3) Performs activity with verbal/gestural cues"*

Narrative:

Methods(s) of Measurement: *Written performance, Oral performance, Demonstration/Performance*

Progress Reporting

Period End: 06/19/09 Level: 2 Status:
Comments: *Drew continues to need supports (up to 5 prompts) before he is able to follow the directions. With verbal reminders or gestural cues, his accuracy on recent trials was 50% & 60%.*

Period End: 11/12/09 Level: 3 Status: *Will be continued (C).*
Comments:

Period End: 03/11/10 Level: 3 Status: *Will be continued (C).*
Comments: *Drew has more success with directions containing certain concepts (next to, beside, around, through, underline, circle); he does continue to have difficulty with interpreting words which signal the sequence to follow (ex. before & after).*

Period End: 04/08/10 Level: 3 Status: *Objective complete (OC).*
Comments:

Short-term Objective: *b) Drew will relate information meaningfully to others by talking about daily activities or personal preferences in response to questions from adults or peers.*

Start: 04/14/09
End: 04/14/10

Checkpoint:

Criteria: *>= 9 occurrences in 9 out of 10 consecutive trials*

Narrative:

Baseline: *<= 3 occurrences*

Narrative:

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/14/09

Academic/Functional Goals and Objectives (con't)

Methods(s) of Measurement: Oral performance.

Progress Reporting

Period End: 06/19/09 Level: 2 Status:
Comments: in progress; Drew can respond appropriately to adults following a scripted conversation about a preferred topic (computer game, free choice activity)

Period End: 11/12/09 Level: 2 Status: Will be continued (C).
Comments: Drew experiences difficulties with answering yes/no questions when the answer should be no. He tends to automatically answer yes to most questions, including, for example, "Do you have a sister?"

Period End: 03/11/10 Level: 3 Status: Will be continued (C).
Comments: Drew has shown growth during structured conversation practice with other students in the social/language group in terms of his ability to respond to questions from adults and peers. With prompting, he is able to turn to look at the speaker, and answer with an appropriate 1-2 word response.

Period End: 04/08/10 Level: 3 Status: Modified (M).
Comments:

Short-term Objective: c) Given opportunities for conversation, Drew will respond appropriately to preceding utterances from others by providing a relevant comment.
Start: 04/14/09
End: 04/14/10

Checkpoint:
Criteria: >= 5 successes, over the course of 1 week(s)

Narrative:

Baseline: <= 1 successes

Narrative:

Methods(s) of Measurement: Oral performance.

Progress Reporting

Period End: 06/19/09 Level: 2 Status:
Comments: In a small group setting, Drew has been observed to comment on other students' behavior/appearance, although he typically does not direct his comments to the person. At this time, he is not offering unprompted remarks in response to peers utterances.

Period End: 11/12/09 Level: 2 Status: Will be continued (C).
Comments:

Period End: 03/11/10 Level: 2 Status: Will be continued (C).
Comments: Drew does make spontaneous comments when conversing with others, but they are not typically linked to information that others have shared.

Period End: 04/08/10 Level: 2 Status: Modified (M).
Comments:

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Legal Name of Student: [redacted] Andrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/14/09

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the extent of nondisabled children.

Annual Goal: *5. The student will improve his motor skills as related to academics as measured by the following objectives:*
Standard/ Access Skill: *Physical*

Short-term Objective: *a) Given the need for a sensory break, Drew will choose an appropriate activity when in the SSN room in order to reorganize himself*
Start: 04/14/09 End: 04/14/10
Checkpoint:
Criteria: *"3) Performs activity with verbal/gesturel cues" in 4 out of 5 consecutive trials*
Narrative:
Baseline: *"2) Participates with partial physical assistance"*
Narrative:
Methods(s) of Measurement: *Demonstration/Performance.*

Progress Reporting

Period End: *06/17/09*	Level: *3*	Status: *Will be continued (C).*	Comments:
Period End: *11/11/09*	Level: *3*	Status: *Will be continued (C).*	Comments:
Period End: *03/05/10*	Level: *3*	Status: *Will be continued (C).*	Comments:
Period End: *04/08/10*	Level: *3*	Status: *Objective complete (OC).*	Comments:

Short-term Objective: *b) Given the opportunity, Drew will keyboard effectively- when typing for 5 minutes or longer he will increase the average number of words that he types*
Start: 04/14/09 End: 04/14/10
Checkpoint:
Criteria: *>= 3 words in a time period of <= 1 min(s) in 3 out of 4 consecutive trials*
Narrative:
Baseline: *>= 1 word in a time period of <= 1 sec(s)*
Narrative:
Methods(s) of Measurement: *Demonstration/Performance.*

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/14/09

Academic/Functional Goals and Objectives (con't)

Progress Reporting

Period End: 06/17/09	Level: 2	Status: Will be continued (C).	
Comments: very inconsistent,			
Period End: 11/11/09	Level: 3	Status: Will be continued (C).	
Comments:			
Period End: 03/05/10	Level: 3	Status: Will be continued (C).	
Comments:			
Period End: 04/08/10	Level: 3	Status: Objective complete (OC).	
Comments:			

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Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/14/09

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the extent of nondisabled children.

Annual Goal: *6. The student will increase independence as measured by the following objectives:*

Standard/ Access Skill: *Self-Advocacy / Self-Determination*

Short-term Objective: *a) Drew will independently follow along with morning and afternoon routines of packing and unpacking his backpack.* Start: 04/14/09 End: 04/14/10

Checkpoint:

Criteria: *"3) Performs activity with verbal/gestural cues" in 4 out of 5 consecutive trials in multiple environment(s)*

Narrative: *May use visual cues.*

Baseline: *"1) Participates with maximal physical assistance" in 2 environment(s)*

Narrative:

Methods(s) of Measurement: *Demonstration/Performance.*

Progress Reporting

Period End: *06/19/09* Level: *2* Status: *Will be continued (C).*
Comments: *Drew still struggles to be independent in his morning routines.*

Period End: *03/08/10* Level: *3* Status: *Will be continued (C).*
Comments: *Drew is able to follow the class morning routine with 1 to 2 cues.*

Period End: *04/08/10* Level: *3* Status:
Comments:

Short-term Objective: *b) Using a work system Drew will increase his independent work time in a non preferred assignment.* Start: 04/14/09 End: 04/14/10

Checkpoint:

Criteria: *"3) Performs activity with verbal/gestural cues" in a time period of >= 10 min(s) in 1 environment(s)*

Narrative:

Baseline: *"1) Participates with maximal physical assistance" in a time period of <= 10 min(s)*

Narrative:

Methods(s) of Measurement: *Demonstration/Performance.*

Progress Reporting

Period End: *06/19/09* Level: *3* Status: *Will be continued (C).*
Comments: *Is sitting down and doing work, but will often not read directions or do his work incorrectly*

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Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 69140907[illegible]7
School of Attendance: Summit View Elementary Date of Meeting: 04/14/09

Academic/Functional Goals and Objectives (con't)

just trying to finish.

Period End: 03/08/10 Level: 2 Status: *Will be continued (C).*
Comments: *Drew does not put forth effort to try non-preferred work unless he is cued to do so and is reminded every few minutes.*

Period End: 04/08/10 Level: 2 Status: *Will be continued (C).*
Comments:

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914060767
School of Attendance: Summit View Elementary Date of Meeting: 04/14/09

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the extent of nondisabled children.

Annual Goal: *7. The student will improve social skills as measured by the following objectives:*
Standard/ Access Skill: *Inter- / Intrapersonal*

Short-term Objective: *a) Drew will respond appropriately to another peer or adult when they greet him.* Start: *04/14/09* End: *04/14/10*
Checkpoint:
Criteria: *"3) Performs activity with verbal/gestural cues" in multiple environment(s)*
Narrative:
Baseline: *"1) Participates with maximal physical assistance" in multiple environment(s)*
Narrative:
Methods(s) of Measurement: *Demonstration/Performance.*

Progress Reporting

Period End: *06/09/09* Level: *3* Status: *Will be continued (C).*
Comments: *Drew is able to look in the direction of a peer/adult who is talking to him when prompted. We will continue to work on his response to a peer/adult.*
Period End: *11/09/09* Level: *3* Status: *Will be continued (C).*
Comments: *Drew is continuing to improve his gaze upon with adults when spoken to. Drew has also improved his ability to respond to others when prompted.*
Period End: *03/04/10* Level: *3* Status: *Will be continued (C).*
Comments: *Drew is beginning to turn and find the speaker, as well as beginning to understand there are rules with talking with others.*

Short-term Objective: *b) Drew will learn socially appropriate behaviors for the school environment such as, following social norms, waiting for a response when he initiates, etc...* Start: *04/14/09* End: *04/14/10*
Checkpoint:
Criteria: *"3) Performs activity with verbal/gestural cues" in multiple environment(s)*
Narrative:
Baseline: *"1) Participates with maximal physical assistance" in 1 environment(s)*
Narrative:
Methods(s) of Measurement: *Demonstration/Performance.*

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/14/09

Academic/Functional Goals and Objectives (con't)

Progress Reporting

Period End: 06/09/09 Level: 3 Status: Will be continued (C).
Comments:

Period End: 11/09/09 Level: 3 Status: Will be continued (C).
Comments:

Period End: 03/04/10 Level: 3 Status: Will be continued (C).
Comments: Drew is making progress on this goal. He shows times when he follows social norms such as waiting for a response. He does a nice job with turn taking as well.

Short-term Objective: c) Drew will comment or ask a question with a familiar peers with two to three exchanges.
Start: 04/14/09
End: 04/14/10

Checkpoint:

Criteria: "2) Participates with partial physical assistance" in multiple environment(s)

Narrative: Would like for Drew to generalize this skill to his classroom peers and onto the playground.

Baseline: "1) Participates with maximal physical assistance"

Narrative: Drew currently needs maximal prompting outside of his SSN room to complete one interaction with a peer.

Methods(s) of Measurement: Demonstration/Performance.

Progress Reporting

Period End: 06/09/09 Level: 3 Status: Will be continued (C).
Comments: On the playground, Drew is doing better with his peers in conversations. With prompting he is beginning to have one to two exchanges with a peer.

Period End: 11/09/09 Level: 3 Status: Will be continued (C).
Comments: Drew is able to have up to three exchenges with familiar peers with and without prompting.

Period End: 03/04/10 Level: 3 Status: Will be continued (C).
Comments: Drew continues to do this with familiar peers. He has responsed to peers from his classroom with minimal prompting, i.e, turn and looking at person, agreeing to play with them.

Douglas County School District Re.1 - Instructional Support Services
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0080

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914060767
School of Attendance: Summit View Elementary Date of Meeting: 04/14/09

Special Education, Related Services & Supplementary Aids/Services

Accommodations / Modifications:

Describe the unique accommodations/modifications necessary for the student to participate in the general education curriculum, as well as, nonacademic and extra curricular activities considering the identified needs of the student.

Systematic instructional techniques including visual work systems and schedules, movement and sensory breaks, clear rewards for meeting expectations or finishing work, clear consequences for undesired behavior

Service Delivery:

Specific services needed to address goals and objectives:
Significant support needs classroom with instruction from a special education teacher, speech/language therapy, occupational therapy, and mental health support.

Special Education Services:

	Service Coordinator	#2	#3	#4	#5
Type of service provider (assignment)	SSN/para	OT staff	MH	SLP/SLPA/E	
Projected beginning date of service	04/14/09	04/14/09	04/14/09	04/14/09	
Projected ending date of service	04/14/10	04/14/10	05/14/10	04/14/10	
	Hours of Special Education Services per Week by Service Provider				
Indirect (consultation)			0.25		
Integrated services in general classroom	19.5				
Direct outside general classroom	13	0.5	0.5	1	
Total hours by provider	32.5	0.5	0.75	1	

Note: Level Matriculation info provided on Comments page.

Other IEP Services:

(such as supplementary aids and services)	Description	Hrs per week
Parent Follow-up Activities		
Preschool Integrated Education Program		

Does the student require:

Special transportation?	☐ Yes	☒ No
A literacy/modality plan? (For Vision Disability)	☐ Yes	☒ No
A communication plan? (For Hearing Disability)	☐ Yes	☒ No
A behavior plan?	☒ Yes	☐ No
A health care plan?	☒ Yes	☐ No
Assistive technology? (If yes, describe):	☐ Yes	☒ No

Extended School Year? ☐ Yes ☒ No ☐ To be determined by: _____
(Rationale for decision)

Drew is attends a 4 track school and therefore currently does not show regression.

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Douglas County School District Re.1 - Instructional Support Services
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0080

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted] *Endrew Robert* LASID: *122955* SASID: *6914080767*
School of Attendance: *Summit View Elementary* Date of Meeting: *04/14/09*

Special Education, Related Services & Supplementary Aides/Services

Recommended Placement in Least Restrictive Environment (LRE):

How much time is student only with students with disabilities? *37% or as behavior allows*

Setting Code: *302 Inside the Regular Class 40% to 79% of the Time*

Why? *This setting best meets his needs & allows him to receive maximum benefit in the LRE.*

Involvement of Student in State and District Assessments:

(a) What state and district assessments of student achievement will the student be taking?

☐ CSAP ☒ CSAP-A ☐ Other: _____

(b) What accommodations, if any, will be provided to the student related to the administration of the assessments of student achievement?

All accommodations in this IEP and allowed by the assessment tool. May include, one on one instruction, simplify verbal directions as allowed per test design, written directions/picture cues as allowed

(c) If the student will not participate in said assessments, why not?

(d) How will the student be assessed?

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(303) 387-0080

Legal Name of Child/Student: [redacted] *Endrew Robert* Date of Meeting: *04/14/09*
Birthdate: [redacted] C.A.: [redacted] LASID: *122955* SASID: *6914080767*

Determination of Disability

DEFINITION: A child with a physical disability shall have a sustained *illness or disabling physical condition* which prevents the child from receiving reasonable educational benefit from general education.

A sustained illness means a prolonged, abnormal condition requiring continued monitoring characterized by limited strength, vitality, or alertness due to chronic or acute health problems and a disabling condition means a severe physical impairment. Conditions such as, but not limited to, traumatic brain injury, autism, attention deficit disorder and cerebral palsy may qualify as a physical disability, if they prevent a child from receiving reasonable educational benefit from general education.

Criteria for a physical disability preventing the child from receiving reasonable educational benefit from general education should be dependent upon the child's diagnosis and degree of involvement in the regular school setting as characterized by any of the following:

The child's chronic health problem or sustained illness requires *(check those that apply)*

- ☐ continual monitoring,
- ☐ intervention, and/or
- ☐ specialized programming

In order to accommodate the effects of the illness so as to reasonably benefit from the educational program.

The child's physical disability interferes with: *(check those that apply)*

- ☐ ambulation,
- ☒ attention,
- ☐ hand movements,
- ☒ coordination,
- ☒ communication,
- ☒ *self-help skills, and*
- ☒ other activities of daily living

to such a degree that it requires: *(check those that apply)*

- ☒ special services,
- ☐ *equipment, and/or*
- ☐ transportation.

REQUIRED FOR DETERMINATION OF A PHYSICAL DISABILITY.

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Form F.8

Douglas County School District Re.1 - Instructional Support Services
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0080

Legal Name of Child/Student: [redacted] *Endrew Robert* Date of Meeting: *04/14/09*
Birthdate: [redacted] C.A.: [redacted] LASID: *122955* SASID: *6914080767*

INDIVIDUAL LITERACY PLAN / COLORADO BASIC LITERACY ACT SUGGESTED PARENT/FAMILY INTERVENTIONS

The following suggested checklist of parent/family literacy interventions are not required by Special Education law, but are based upon Colorado Basic Literacy Act (CBLA) requirements:

Elementary School Level

Primary Level: Parent privides support outside the school day.

- ☐ Read to the child each day.
- ☒ Read with the child each day.
- ☒ Talk with the child about what they are reading and/or watching.
- ☒ Encourage child to use reading for a variety of reasons (recipes, lists, etc.).
- ☒ Write for a variety of reasons (cards, letters, journals, etc.).
- ☐ Practice alphabet letter identification and letter sounds with the child.
- ☒ Practice reading high frequency word cards with the child.
- ☐ Monitor the child's homework.
- ☐ Other:
  frequent repetition with favorite texts

Intermediate Level: Parent provides support outside the school day.

- ☐ Read to the child each day.
- ☐ Read with the child each day.
- ☐ Talk with the child about what they are reading and/or watching.
- ☐ Encourage child to use reading for a variety of reasons: recipes, newspapers, magazines, lists, letters, etc.).
- ☐ Monitor the child's homework.
- ☐ Attend parent/teacher conferences.
- ☐ Provide additional support in the following ways:

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(303) 387-0080

DRAFT

Legal Name of Student: [redacted] Andrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Implementation Date: Draft

Behavior Intervention Plan

Contributors to Plan:

Amy Holton, SSN Teacher; Robin Kessel, Speech and Language Therapist; Monica Ritzdorf, COTA ,Kathy Lennan, Occupational Therapist; Nicole Breuer, Social Worker

Background Information:

Drew has a diagnosis of Autism with ADHD; he is currently taking the following medications to regulate his behavior: Lexapro 20mg, Concerta extended release 54mg and 36 mg (equals 90 mg), and Intuniv 4mg. Per Mrs. [redacted] report, all medications are given in the morning just before coming to school. The addition of the Intuniv medication began in February of 2010. The Concerta has been increased over time since the third grade. Drew has been served in the general education and SSN classrooms for the 2009/2010 school year. He has made growth in many domains. For example, Drew is able to express some simple emotions (happy, mad) and he is able to take turns playing a game with others. Drew is also beginning to look towards the person talking and he is responding with a one word greeting. According to the SSN teacher, when Drew is supported by a para in his general education classroom he can become dependent on the para that is with him. There have been efforts to aid Drew in recognizing his general education teacher as the lead adult to reference when in his classroom Drew continues to first reference his para prior to his general education teacher. Drew is able to use a limited variety of language skills. He is able to answer simple, direct questions with simple direct answers. He has made some growth ,with prompting, to ask a question of a peer based on a specific topic of information. Drew also uses language that he echoes from computer games, television, and movies. This can be spontaneous language and may or may not be related to the subject at hand. When Drew becomes frustrated in the school environment, he has a tendency to display behaviors that are disruptive to his and others learning environments. This plan was drafted after Stacey Struessel, behavior specialist received consent from Mrs. [redacted] to be involved. The outcome for this plan was to address the behaviors exhibited by Drew when he appears agitated and /or anxious in the educational environment. An initial draft was formulated in April 2010. A meeting was held on 12/15/10 with parents and additional team members to update the plan. At this point, there has not been an opportunity to implement this plan as Drew was withdrawn from Douglas County School District on May 7th, 2010.

Concerning Behaviors:	Frequency:	Duration:
Climbing furniture	*During episode of bx.*	*Less than 1 min.*
Scripted falling off furniture (chair when seated, walking up the ramp, then says "oh, baby.")	*During episode of bx-to daily.*	*Less than 1 min.*
Hitting computer/TV screens	*Repetitive once starts.*	*Less than 1 min./ every 30 s. to 1 min.*

These behaviors occur when Drew begins an

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Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Implementation Date: Draft

Behavior Intervention Plan

episode of bx//beginning at 8:40-10am or 10:30

Seeks punishment by: (asking others to spank him, including mom)	Either onset or during a bx. episode.	Less than 1 min.
Yelling/screaming (I hate you)	Multiple x /wk.	Intermittent throughout an episode.
Scripted dumping behavior	During bx episodes.	
Kicking people Kicking walls	Two times per episode. Multiple x within an episode	1-3 times a week until he completes his script. Less than 1 min.
Head banging	Multiple x within an episode.	1-3 min.

Function/Motivation for Behavior:

Drew is a student who appears to be displaying behavior due to avoidance of expectations in the school environment that he perceives as difficult regardless of the subject area. It seems Drew may not fully understand the "purpose" behind the assignments asked of him. The team is questioning sensory processing difficulties as a function for behavior due to Drew appearing to look agitated/"crawling out of his skin" at times. This is evidenced by "Drew laying on the floor, picking at his shoes, pulling at his clothes, being in constant movement." Finally, the team is also questioning communication as a function for behavior, due to Drew's limited ability to express his needs or wants.

Behavior Goal 1:	Criteria:	Criteria Narrative:
Recognize early signs of frustration/anxiety and engage in appropriate coping strategies.	No data collection criteria specified.	

Behavior Goal 2:	Criteria:	Criteria Narrative:
Drew will request basic wants and needs when calm by using verbal or gestural cues.	"3) Performs activity with verbal/gestural cues" in a time period of <= 10 min(s) in 2 environment(s)	Drew will be able to state a want or need when asked.

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Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Implementation Date: Draft

Behavior Intervention Plan

Environmental / Preventative Strategies:

What:	Staff Responsible:
Consistent/structured morning routine	SSN staff
Quiet introduction to school (soft lighting, soft music, SSN room)	SSN & Support staff
Sensory breaks at home	Parents
Front loaded sensory breaks at school	OT/SSN & support staff
3 smiley faces/checks/dollars/stars:eams reward (visual schedule)	All staff
Written directions to reduce auditory	All staff
Positive verbal reinforcement	All staff
Clear directions - no more than one step at a time	All staff
Reduce expectations of Drew until 10am	All staff
Re-enforce Drew is "safe" at school	SSN staff
Social stories	All staff
Access to visual 5 point scale for reference	MH/SSN staff

Direct Teaching of Needed Skills:

What	Staff Responsible:
Joint attention and anticipation of opportunities with people	MH/ SSN staff
Provide script (& pre-teach) for what to do when upset	MH/SSN staff
Identification of emotional states (Alert or 5 -point scale)	MH/OT
Prompting Drew to ask for assistance when needed for basic needs/wants	All staff

Teachable Moments / Responses to Behaviors:

When Student Does This:	Staff Will Do This:
Shows anxiety by:	**Be supportive by:**
Ignores adult directions	Engage Drew in conversation, allow for sensory
Does not say "Hi"	break & allow him choice of sensory task.
Eyes dart	Set up situation for him to be successful.
Body becomes rigid, racing heart	Ask him, "What do you want to learn today?"
Unresponsive and runs own agenda	Alter environment: soft lights and music.
Does not follow routine/exhibits refusal behaviors	Decrease expectations until resolved.
Enters classroom and goes everywhere but desk	
Shows defensiveness by:	**Be directive by:**
Goes under desk	Use white boards to communicate
Screams/Yells	Clear room, or get Drew to safe area
Eyes look around room	Allow Drew to run through his scripted behavior
Increased scripting, shouts "Wait"	Attempt to figure out what is important to him at
No communication of any needs	moment and what he needs- offer it.
Scripted/pattered behaviors	Use Drew's vocabulary, help learn he can earn it

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Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Implementation Date: Draft

Behavior Intervention Plan

(dumping, climbing, falling down)
Self Injurious behaviors (head banging/kicking)

Enters Tension Reduction:
Laying on bean bag
Apologizes to adult
Exhausted self

and then redirect him by, "What do you want to earn, make a good choice, earn 3 happy faces (obtained within 15 minutes) and you can do ."

Create Therapeutic Rapport by:
Find way to re-engage him in school or play.

Other Information / Actions To Be Taken:

Follow up questions for parents/ongoing assessment:
Anxiety vs. medication side effects?
Avoidance vs. anxious behaviors?
What triggers lead to avoidance or anxious behavior?
What is the tie between morning routine and medication side effects & transition to school?
What is a "typical" routine at home in the morning?
What opportunities has Drew had to practice social interactions outside of the school environment?

Implementation Date: Draft Follow-up Meeting:

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Douglas County School District Re.1 - Instructional Support Services
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0080

Legal Name of Student: [redacted], Andrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Implementation Date: 04/25/09

Behavior Intervention Plan

Contributors to Plan:
Amy Holton (SSN teacher), Jennifer [redacted] (Mother), Rochelle Evans (school psychologist), Nicole Breuer (social worker)

Background Information:
Drew has been diagnosed with Autism and ADHD; he is currently taking medications to help him regulate his behaviors. Drew has been in the SSN classroom this past year and has made growth in many domains, but has also become somewhat dependent on the SSN paras in the general education classroom. As Drew moves through the next school year (4th grade), it is important that he begin to see the general education teacher as the lead adult to reference. Drew is able to use a limited variety of language skills. He is able to answer simple, direct questions with simple direct answers, but will also use language that he echos from computer, television, and movies. This can be spontaneous language and may or may not be related to the subject at hand. When Drew becomes frustrated in the classroom, he has a tendency to yell out and can sometimes wander out of his seat. This behavior plan is being implemented to address those behaviors.

Concerning Behaviors:	Frequency:	Duration:
Drew yells out when frustrated	*3-4 times a week*	*until removed from class*
Drew gets out of his seat and wanders around the classroom	*daily*	*until redirected by an adult*

Function/Motivation for Behavior:
Reduction of anxiety
Avoidance

Behavior Goal 1:	Definition of Success:	Measures of Progress:
Drew will use appropriate volume in the classroom	*Increased time in the general education classroom*	*Teacher/staff report*

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Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914060767
School of Attendance: Summit View Elementary Implementation Date: 04/25/09

Behavior Intervention Plan

Behavior Goal 2:	Definition of Success:	Measures of Progress:
Drew will reduce the time spent walking around the classroom	Increased time in seat	Teacher/Staff report

Environmental / Preventative Strategies:

What:	Staff Responsible:
Positive verbal and tangible (smiley faces) reinforcement, OT strategies, clear directions, structured routine, consistency, provide written instructions/rules for task or targeted time period which Drew can reference during worktime	All

Direct Teaching of Needed Skills:

What:	Staff Responsible
Give Drew appropriate words to use when frustrated Increase frustration tolerance	MH, SSN teacher and peras, classroom teacher, administration.

Teachable Moments / Responses to Behaviors:

When Student Does This:	Staff Will Do This:
When Drew becomes fidgety, darts his eyes, and/or says, "try again!"...	...quickly provide more positive reinforcement and notice all positives on paper with smiley faces to help him calm back down
talks about movies or other media...	...briefly acknowledge what Drew is saying and then redirect him to his assignment
Yells out in class...	...have Drew write related sentences in an area near his classroom and then go back to class to complete assignment
Asks for a break during work time...	...acknowledge request, praise him for asking appropriately, affirm that he can have a break AFTER he finishes his work.

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Legal Name of Student: [redacted] Andrew Robert LASID: 122955 SASID: 6914060767
School of Attendance: Summit View Elementary Implementation Date: 04/25/09

Behavior Intervention Plan

Other Information / Actions To Be Taken:

When in doubt, if Drew is exhibiting behaviors not mentioned in behavior plan, staff should allow Drew only what they allow other students (e.g. if Drew begins to wander the room and remove items from counters or desks, he needs to be redirected as other students are and asked to return things to where he found them).

Implementation Date: Apr 25, 2009 Follow-up Meeting: _____

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Douglas County School District Re.1 - Instructional Support Services
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0080

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted], Andrew Robert | LASID: 122955 | SASID: 0914080767
School of Attendance: Summit View Elementary | Date of Meeting: 04/14/09

Comments

1. 04/16/09 Kessel, Robin - Mrs. [redacted] requested additional time to review the proposed goals and objectives before Drew's draft IEP is finalized. She agreed to waive her right to have his IEP finalized within three days of his IEP meeting.

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Douglas County School District Re.1 - Special Education Department
620 Wilcox St. Castle Rock, CO 80104
(303) 387-0080

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Date of Meeting: 04/13/10

Individualized Education Program (IEP) for: [redacted] Andrew Robert

Student Information

DOB: [redacted]	LASID: 122855	SASID: 6914080767	Medicaid #:
Home School: Summit View Elementary		School of Attendance: Summit View Elementary	
Grade: 4 Track: Mod.		Ethnicity: White (not Hispanic)	
Age: 10yrs 6mos Gender: M		English Language learner? ☐ Yes ☒ No	

Parent Information

Parent/Guardian	Parent/Guardian
Last Name: [redacted]	Last Name: [redacted]
First name: Joe	First Name: Jennifer
Address: [redacted]	Address: [redacted]
City: [redacted]	City: [redacted]
State: [redacted] Zip: [redacted]	State: [redacted] Zip: [redacted]
Home Phone: [redacted]	Home Phone: [redacted]
Work Phone:	Work Phone: [redacted]
Relationship to Student: Father	Relationship to Student: Mother
Primary Language: English	Primary Language: English

Special Education Information

Date of Initial Eligibility Meeting: 06/25/02 (month/day/year)

Date of Last IEP Review: 04/14/09 (month/day/year)

Date of Next Eligibility Meeting: 04/29/11 (month/day/year)

Date of Next Annual Review: 04/13/11 (month/day/year)

Reason for Meeting: ☐ Initial ☐ Triennial ☒ Annual ☐ Other:

Primary Disability: Physical Disability / Autism

Setting Code: 303 (L.M.41)

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EXHIBIT 4

Douglas County School District Re.1 - Special Education Department
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0080

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 122955
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Participants in Meeting

Initials indicate participation only.

The following participants must be in attendance:
(please print name and initial if you are in attendance at the meeting.)

Jennifer [redacted]
Student's Parent/Surrogate Parent
(unless parent decided not to attend)

Student's Parent
(unless parent decided not to attend)

I have received my "Procedural Rights" within the last calendar year: _____ (Parent initials)

Robin Kessel RK
Special Education Director/Designee

Amy Holton
Special Ed. Teacher / S/L Pathologist

Kathryn Reoh KR
General Education Teacher
(if the student is or may be participating in the general education environment)

Student
(when appropriate)

Keri McCabe
Building Principal / Designee
(for eligibility only)

Interpreter
(when appropriate)

Others with knowledge and expertise regarding this student:

Robin Kessel RK
Speech / Language Pathologist

School Nurse

Katherine Lennen KL
Occupational Therapist

Physical Therapist

School Psychologist

Nicole Breuer NB
School Social Worker

Audiologist

School Counselor

Jeff Konrade-Helm
Other *(specify area represented)* Advocate

Other *(specify area represented)*

Non-Attendee

Non-Attendee

Non-Attendee

Non-Attendee

Douglas County School District Re.1 - Special Education Department
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0080

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

Background/Historical Data

(Family and medical history, patterns of strength/weaknesses in academic, social/emotional/behavioral functioning)
No updated information in the areas of family, health (see nurse's report). Jennifer's main request is more support in the areas of mental health. Because Drew is a sensory child, she suggests a recess group where upon he could sign up with one buddy per week to play with. This would need to be monitored by an adult. He enjoys physical sensory type things such as hide and seek or playing the game tag. All of his interactions would not need to be question driven with his peers. The focal point would be the involvement/ interactions at recess.

Also, if the schedule permits, Drew could follow recess with the same buddy or buddies to have lunch. Again this would need to be guided by an adult to foster conversation (most likely about the events of recess). Repetition will be key for Drew to establish a social routine.

Mental health support could also include a small group inside upon focusing on eye contact, turn-taking, game-playing and even possible social stories.

05/20/05
Home visit with Mrs. [redacted] record review, team consultation Drew has been attending preschool at the Rock Canyon site 4 days/wk and enjoys going to school. This is Drew's third year with the preschool program. Mrs. [redacted] continues to be pleased with Drew's developmental progress. He is typically using 3 word phrases (and some 4 word phrases) to convey his needs/wants (e.g., "mommy, sit down"). Drew's mom feels the ideas that he is able to verbalize have expanded and become more complex. He is also doing more verbal commenting during his play. In the area of language, the [redacted] top current priority is Drew's articulation errors which increase when he is excited and talking rapidly. Drew seems to be more receptive to interactions with peers and now his family would like to see him using his language in these social interactions. Drew continues to enjoy and do well with gross motor activities and has less interest in the fine motor activity of writing. Drew is able to write his name and draw some simple shapes; his mom remains concerned about his tool grip. Drew continues to participate in private treatment that includes 9 hrs/wk of home training and 3 hrs/wk of an integrated play group with Annette Nunez. Since 10/04 Drew has been taking Ritalin and his mom feels it has decreased his impulsivity and improved his body control. The Vineland Adaptive Behavior Scales was completed with Mrs. [redacted] to assess Drew's adaptive skills and yielded the following results:

DOMAIN	STANDARD SCORE	PERCENTILE RANK	ADAPTIVE LEVEL
Communication	72	3	Mod. Low
Daily Living Skills	64	1	Low
Socialization	68	2	Low
Motor Skills	84	14	Mod. Low
Overall Composite	66	1	Low

Drew's overall adaptive skills are at the 1st percentile when compared to peers which is consistent with a diagnosis of Autism Spectrum Disorder. Mrs. [redacted] has noticed some increased rigidity from Drew recently around having to take the same route to school and get out of the car on a specific side and hopes he can gain some more flexibility. Mrs. [redacted] is eager to learn more details about Drew's transition to kindergarten including what steps can be taken to increase Drew's success in his process and what schedule will be utilized to help him with the routine in the new setting. The [redacted] have been terrific advocates for Drew's educational needs and proactive in utilizing school, private and community resources to support Drew's

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Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

progress.

Current Instructional Plan
(Include interventions implemented e.g., frequency, duration, grouping; instructional strategies used)
Typically Drew spends 3.2 hours in his general educat... setting per day. This time fluxuated depending on Drew's behavior. His time in general education is spent in his classroom and attending specials, and recess/lunch with his peers. Drew attends all but 30 minutes of his time in general education with a paraeducator. Drew has benefitted from attending his class in the mornings where he takes part in the morning routines. He also uses part of this time to work on name/face recognition of his classmates and take part in a scripted daily conversation with his general education teacher. The 30 minutes of unsupported time is during class read aloud/snack. Drew also attends his class for social studies and science. The last 30 minutes of the day are also spent in the general educaton classroom where Drew uses his earned computer time and particlpates in the packing up routine of the class. The rest of Drew's day is spent in the self-contained SSN room. Drew benefits from the lower ratio of students and the 1on 1 instruction of the SSN program. Drew also needs opportunities for sensory breaks, small group instruction in social skills and classroom behavior, and an opportunity to work on organization, self help and independent skills. Drew also receives Speech Language services for and hour a week, OT for 30 minutes a week and mental health for 30 minutes per week.

Evaluations Administered/Date/and/or Information Reviewed

Classroom Observation (Other than classroom teacher)	Evaluator	Date of Evaluation
	Nicole Breuer, LCSW	*Apr 6, 2010*

On Tuesday, April 6, an observation of Drew in his general education classroom occurred. The class was involved in group work and students were focused on the document camera at the front of the room. The teacher was reviewing student writing as a class. It was noted the students in the class were involved in the activity. They were participating by listening, making comments, and observations. During this observation Drew was seated at his desk quietly. He was coloring on a piece of paper with markers. When the teacher asked a question of the class, Drew would look up and look around the classroom, and then when another student began talking, Drew would refocus on either his drawing, or his marker. At times it was noted Drew would look up and reference the room and re engage with his activity without participating in the group work. During this observation, Drew sat quietly at his desk, he was respectful of his peers learning environment. He did not disturb others. He swung his feet back and forth, took the marker cap on and off, and picked at his fingers.

Academic Skills	Evaluator	Date of Evaluation
	Amy Hollon, SSN Teacher	*Apr 8, 2010*

Reading: Drew does best when reading with a 1 to 1 ratio. He continues to need support for comprehension and retelling. Drew's ability to word call remains higher than his ability to comprehend. Drew needs visual aides to help with comprehension.

Writing: Writing tasks have to be broken down into small steps using visual support. Drew often needs a great deal of prompts to write. This is best accomplished in a 1 on 1 setting.

Math: This area continues to be a strength for Drew. He is strong with his computation skills and often used this as a way to calm down. As more language, reasoning, and problem solving is introduced into the math curriculum, Drew continues to need more support. He continues to work on word problems and life skills math.

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Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

Communication Skills	Evaluator	Date of Evaluation
	Robin Kassel, MA CCC-SLP	Apr 8, 2010

Current information is based upon:
File Review
Observation
Data Collection/Informal assessments
Consultation with Staff

Drew's difficulties with communication are primarily in the areas of social/pragmatic language skills. He has learned to consistently greet adults and classmates, but typically does not extend conversation beyond that level. Drew will respond to scripted conversational exchanges with verbal prompting, but struggles with spontaneously responding to questions or preceding utterances from others. Drew is most successful when interacting with familiar adults. Spontaneous peer interactions remain challenging for him. When Drew does spontaneously make comments or respond to questions, his remarks are often off-topic, and reflect whatever is on his mind at that moment. When asked Yes/No questions, Drew's instinct is to answer "Yes", even when a "No" answer is appropriate (ex. "Do you have a sister?"). Giving Drew choices to select from when answering WH questions increases his level of success. Drew has difficulties verbalizing discomfort and at times struggles with relaying his needs/wants, resulting in frustration and acting out behaviors. Vocabulary skills are a strength for Drew, in terms of his ability to label pictures, objects and words related to targeted content. His speech is characterized by a few sound substitution errors, but they do not impact his overall speech intelligibility.

Communication Rating: V = 1 F = 1 A = 1 L = 1 Total CRS = OR FC = 4
Comment: _____

Cognitive Functioning	Evaluator	Date of Evaluation
	H. Radford, Ed.S.	Apr 29, 2008

The School Function Assessment (SFA) is used to measure a student's performance of functional tasks that support his/her participation in academic and social aspects in school grades K-6. The SFA is comprised of 3 parts:

Part 1-Participation. Examines a student's level of participation in 6 major school settings: regular or special ed classroom, playground/recess, transportation to/from school, bathroom, transition to/from class and mealtime.

Part 2-Task Supports. Examines the supports provided when the student performs school related activities. The 2 types of supports examined are: Assistance (adult help), and Adaptations (modifications to the environment) such as adapted materials or specialized equipment.

Part 3-Activity Performance. Examines the student's performance on specific school related functional activities. Activities include: Functional Communication, Memory and understanding, Following social conventions, Compliance with directives and school rules, Task completion, Positive interaction, Behavior regulation, Safety and Personal care awareness.

Drew was rated by his SSN one to one aid. Drew requires Extensive to Moderate assistance and adaptations on all cognitive/behavioral tasks with the exception of the memory and understanding area where he needs only minimal assistance and adaptations.

Drew is able to communicate yes/no, acceptance/refusal or a choice between two or more items with consistent performance. On the other hand, he rarely advocates for himself when he needs help with a functional academic tasks such as opening a container or where he would go if he were lost.

Drew's personal strength is in the area of memory and understanding. For example, he is able to

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Legal Name of Student: [redacted], Andrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

remember daily routines and basic one step directions such as stop, come here and get book with consistent performance. Additionally, Drew consistently demonstrates an ability to follow a series of three or more related instructions (such as put things away, put on your coat, and line up).

Drew is inconsistent in the area of following social conventions. For example he will often use words such as please, thank you and sorry when appropriate but does not recognize how and when to communicate private matters such as a toileting accident.

Compliance with adult directives and school rules are significantly below that of same aged peers. While Drew generally will observe rules around movement around the classroom/school, when he is in a state of obsession/compulsion usually around timers and watches, he has difficulty responding to redirection and will not stop immediately when instructed to do so.

Drew requires significant assistance from others to maintain his safety, task completion, personal care and behavioral regulation.

The Universal Nonverbal Intelligence test (UNIT) was attempted with Drew. The examiner is not allowed to use words to demonstrate the tasks. While Drew picked up on many of the nonverbal gestures such as wait and begin, his attention to task and fleeting eye contact made his subtest score invalid.

5-15-05. Classroom observation, review of records, update of information from teacher, Kaufman Brief Intelligence Test (K*BIT). In February of 2004, Drew's cognitive development was evaluated at the request of his mother and pediatrician (please see separate report). At that time, the Differential Ability Scale (DAS) was attempted but only partially successful. In the classroom, Drew's behavior and attention was nicely developed for familiar tasks and his behavior during testing was atypical for him, but indicative of being taken out of his routine and presented with novel tasks. Drew participated with the verbal items but his attention and behavior prevented completion of the nonverbal items. Verbally on the DAS, Drew's concept knowledge (Naming Vocabulary T = 33) was significantly stronger than his understanding of more abstract verbal information (Verbal Comprehension T=24) and his overall verbal thinking skills were significantly delayed for his age (Verbal SS = 64). Understanding relationships in pictures was challenging for Drew as well (Picture Similarities T=24). Drew's direct matching skills were strong but matching based on similarities or simple categories was a challenge for him. The Developmental Observation Checklist System (DOCS) was completed by Drew's teachers to determine the validity of the DAS. Drew's cognitive development, as reported by his teachers responses on the DOCS, continued to show a pattern of significant delay (SS=64) that was consistent with the DAS and approximated the 23 month age level. Although his scores were more indicative of a 2 year old, Drew's teachers felt that with facilitation and a familiar routine, his functioning in the classroom was more like a new 3 year old. Currently, Drew is functioning within the Below Average range of intelligence at the 8th percentile (SS=79) on the K*BIT. His true score should fall within the range of 69-89 with 95% accuracy. This is somewhat improved from his performance last year on the DAS and the DOCS, which may be attributed to his being on Ritalin. Drew's vocabulary knowledge was Below Average (SS=75), as were his nonverbal reasoning skills (SS=87). Although on Ritalin, Drew was extremely distractible during this assessment, which negatively impacted his performance. He appeared stressed to be out of his class and routine, often looking into the class and repeating whatever was being said in class. Even given his distraction, this appears to be a fairly accurate estimate of Drew's current level of thinking based on his classroom performance and teacher report.

Social/Emotional/Behavioral Functioning	Evaluator	Date of Evaluation
	Nicole Brewer, LCSW	*Apr 6, 2010*

Classroom observation, participation in social language group, teacher, and educational assistant report

Drew is a 10 year six month old boy in fourth grade. His progress is being updated as part of his annual review of his individual education plan. Drew has made some progress socially in an educational setting. Drew greets others by name; he will look at the person he is speaking to, more with prompting than without.

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Legal Name of Student: [redacted], Andrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

Drew does not appear to reference other peers in the general education setting, nor on the playground setting. A voluntary playground sign up sheet was introduced to Drew's general education class. When reviewing the sign up sheet students have signed up in all slots. However, according the para, who is with Drew during the recess time, the students who are signed up are not approaching Drew to interact for the first five minutes of recess. Drew requires prompting to engage with a peer when they speak to him, however with adults, Drew is more likely to greet without prompting.

In social group, Drew does a nice job participating with other student. With support, Drew is able to have up to two exchanges with peers, i.e., "what is your favorite game?" and waiting for response. He is working towards making a comment on the information he hears. He does a nice job staying in his personal space. He would benefit from additional facial referencing. Drew is learning the social rules for communicating with others. Drew does a nice job taking turns with adults when playing a game, but needs more prompting when playing games with other students.

Concerning behaviors, Drew seems to have limited means of expressing his thoughts/ emotions. When upset by events that occur in the home, with academics, or possibly with others in his environment, Drew reacts to such feelings by yelling, dumping shelves and objects from shelves, disrobing or ripping his clothes, kicking walls, running, and pretend falling. At times, Drew will also entangle himself in chairs and other furniture. This behavior is inhibiting him from accessing academic learning as well as social learning. When Drew's exhibits such behavior he typically does not stop until he wears himself out. At times, he has re engaged in learning and been able to calm down enough to focus and he has also teetered on the edge of losing control later in the day. Drew typically exhibits this behavior between 8:45 and 10:00 in the morning.

It appears Drew would benefit from ongoing support with social stories in appropriate school behavior, as well as learning how to regulate his emotions.

Physical	Evaluator	Date of Evaluation
	Katherine Lennan, OTR	*Apr 8, 2010*

Assessment includes records review, OT intervention, observation in the classroom, and informal assessment.

Drew is a 10 year 6 month old boy who receives Occupational Therapy as part of his educational program. Within the past year, Drew has been seen 30 minutes a week both individually and in a group to focus on his sensory processing and typing skills. This is an Annual report to update his functional levels.

Motor Checklist

Drew was informally assessed for fine and gross motor skills. He demonstrates the ability to manage classroom tools, fold paper, manage scissors, manage a hole punch and stapler. Gross motor skills include tasks requiring strength, coordination and balance such as walking on a balance beam, jumping, hopping, skipping, running, and climbing on playground equipment. Drew demonstrates adequate fine and gross motor skills to access his school environment.

Handwriting/Keyboarding Assessment

A handwriting sample was obtained from classroom assignments. Drew demonstrates adequate fine motor skills for letter formation, alignment, spacing, sizing and general legibility for handwriting tasks but legibility is variable with his attention to task. He demonstrates a functional grasp on writing utensils and a consistent hand dominance. He is able to access a keyboard without modifications and is now able to type at a rate of 7-9 wpm.

Activities of Daily Living (ADL's)/Self-Care

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Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

Drew demonstrates adequate self-care skills to access the school environment.

Sensory Needs
Drew demonstrates the need for excessive amounts of sensory input in order to increase his ability to function within the academic setting. Every spring, Drew seems more disorganized and requires more sensory breaks and more intense sensory input. His sensory integration difficulties are demonstrated by his distractibility, constant need for fidgeting or movement, and need to touch things. Loud noises including in the cafeteria, parties, and assemblies can cause Drew distress and he will begin to wander or yell out. A variety of sensory strategies have been taught to Drew and he has demonstrated how to use them effectively. Drew will often seek deep pressure, neutral warmth, and chewing to reorganize himself internally. Some of his preferred activities have been having a therapy ball rolled on him, wrapping himself in a sleeping bag, chewing, and "pizza".

Health Status — Evaluator: W. Pepper RN BSN — Date of Evaluation: Apr 13, 2009

4/13/09 Annual update. Information obtained from mother, Jennifer [redacted] as well as from files reviewed. See previous report below. Drew has been diagnosed with autism, ADHD, and severe allergies to nuts and peanuts. Currently, Drew's daily medications are Concerta and Lexapro. Epi pen jr has been prescribed to be given as needed for severe allergic reactions. Mother reports that the side effects he experiences from Concerta and Lexapro include diminished appetite and sleep disruptions. (Medications are per physician and subject to change without notice.) Distractibility, difficulty maintaining attention and focus and disruptive behaviors are areas of concern. Social interaction and communication issues persist. Se attached health care plans.
W.Pepper RN BSN

4/28/08 Reviewed school records, IEP reports, and the health information update form completed by Jennifer [redacted] mother. No significant medical concerns reported regarding the pregnancy or Drew's birth. Mom notes that Drew experienced some speech delays. Drew has been diagnosed with Autism (2001) and ADHD (2005). He is currently taking Lexapro, Focalin and quanfacine daily. Mom reports that side effects Drew has experienced include some sleep disruptions. Mom also notes that Drew has some anxiety. Additionally, Drew has seasonal allergies. Drew has very good school attendance. Unable to screen for vision at school. No concerns in the classroom regarding vision. Hearing tested by district audiologist. K. Mueller RN,BSN

Results of vision screening: 9/28/09 20/20 R & L
Results of hearing screening: 9/28/09 Pass R & L
Health Care Plan?: Yes
How does it relate to the suspected disability?:

Interpretation of Results:
(Include interpretation of the above data as well as information regarding student growth/progress. For eligibility meetings, include conclusions about the RII that is documented above.)
In the general education class Drew has most success during read aloud time. Drew will eat his snack and listen to the story. Drew often appears to not be listening as he will color or work a puzzle as the teacher is reading. In group activities, Drew shows initial interest but his attention is short and he needs redirection from the paraeducator. His peers will try to redirect him but he only listens to the redirection from the paraeducator. Drew enjoys playing math fact games with the class. He greets kids in his class and his teacher. Drew's conversations are limited to "hi" with peers and he has scripted conversations with his teacher.

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Legal Name of Student: [redacted], Andrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Documentation of Evaluation Data, Present Level of Educational and Functional Performance, and Educational Needs

Drew continues to need specialized instruction for reading, writing and math. Drew's level of anxiety with academic demands especially with new concepts continues to be high. This year he has had an increase in aggressive behaviors resulting in room clears and the use of calming down areas.

Drew exhibits significant weaknesses with social language skills, and continues to need specialized instruction for development of communication skills.

Drew demonstrates fine/gross motor and visual motor skills that are functional for the academic environment when he is able to focus his attention. He remains very distractible and requires frequent cueing to remain on task. The rapid rate at which he completes many tasks often negatively impacts his performance.

Present Level of Educational and Functional Performance

(How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?)

Drew's disability impacts his access to the general curriculum in all areas. He requires specialized instruction for academics and paraprofessional support to participate in the general classroom activities.

Drew's communication difficulties impact his ability to interact with peers and adults in an educational setting.

Drew's difficulty with sensory processing and self-regulation skills negatively impacts his ability to access his educational program.

Educational Needs

(Due to the suspected disability, what skills does the student need to learn in order to access the general curriculum?)

To improve reading, writing, and math skills
Continue to strengthen daily living skills
To improve social language skills
To improve self-regulation

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Douglas County School District Re.1 - Special Education Department
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0060

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted] Andrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Determination of Eligibility and Disability

(This section completed only for eligibility meetings)

Have sufficient and appropriate evaluations been completed, documented, and considered to determine the child's/student's current level of functioning, achievement, performance and educational needs? ☐ Yes ☐ No

If not, obtain additional information and reconvene the meeting.

(This section completed only for eligibility meetings).

☐ is ☐ is not *due to a lack of appropriate instruction in reading, including the essential components of reading instruction.*

☐ is ☐ is not *due to a lack of appropriate instruction in math.*

☐ is ☐ is not *due to limited English proficiency.*

(This section completed only for eligibility meetings.)

If no, does the child/student have a disability as defined in the State Rules for the Administration of the Exceptional Children's Educational Act? ☐ Yes ☐ No

If no, terminate the meeting.

If the student has a disability, the disability is:
(If more than one disability is determined, the primary disability should be identified with a 1, the secondary disability with a 2.

☐ Significant Limited Intellectual Capacity

☐ Significant Identifiable Emotional Disability

☐ Specific Learning Disability

☐ Hearing Disability *(requires communication plan)*

☐ Vision Disability *(requires literacy plan)*

☐ Speech or Language Impairment

☐ Preschool Child with a Disability

Physical Disability

☐ Traumatic Brain Injury
[1] Autism
☐ Other Physical Disability
☐ Check if physical disability due to ADD/ADHD.

Multiple Disabilities

☐ Deaf-Blind
☐ Multiple Disabilities with Cognitive Impairment

Complete the appropriate checklist for determination of each disability selected.

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620 Wilcox St, Castle Rock, CO 80104
(303) 387-0080

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Academic/Functional Goals and Objectives

With the exception of the Initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the same extent as nondisabled children.

Annual Goal: *1. The student will demonstrate the ability to read and comprehend a variety of instructional-leveled texts, as measured by the following objectives:*

Standard/ Access Skill: *Language Arts, 4*

Short-term Objective: *a) Drew will read non-fiction texts and answer teacher directed questions from his reading.* Start: 04/13/10 End: 04/13/11

Checkpoint: *4 - 6 (4.2): Uses a variety of strategies (e.g., asking questions, drawing conclusions, using clues from text to support generalizations, distinguishing between fact/opinion and cause/effect) to comprehend narrative and expository text.*

Criteria: *>= 80 percent in 3 out of 4 consecutive trials with <= 2 verbal prompts*

Narrative:

Baseline: *>= 50 percent with >= 5 verbal prompts*

Narrative:

Methods(s) of Measurement: *Written performance, Oral performance.*

Progress Reporting

Period End: Level: Status:
Comments:

Short-term Objective: *b) Given a set of directions or steps, Drew will read and follow the directions or steps.* Start: 04/13/10 End: 04/13/11

Checkpoint: *4 - 6 (4.2): Uses a variety of strategies (e.g., asking questions, drawing conclusions, using clues from text to support generalizations, distinguishing between fact/opinion and cause/effect) to comprehend narrative and expository text.*

Criteria: *>= 80 percent in 3 out of 4 consecutive trials with <= 2 verbal prompts*

Narrative:

Baseline: *<= 50 percent with >= 3 verbal prompts*

Progress Key:
1. Skill / behavior is rarely or never demonstrated, therefore incomplete positive data is available.
2. Skill / behavior is inconsistent with frequent prompts and is below expectations of plan.
3. Skill / behavior is consistent over time with few prompts and meets expectations of plan.
4. Skill / behavior is generalized and transferred without prompts and is above expectations of plan.

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Legal Name of Student: [redacted] Andrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Academic/Functional Goals and Objectives (con't)

Narrative:

Methods(s) of Measurement: Demonstration/Performance

Progress Reporting

Period End: Level: Status:
Comments:

Legal Name of Student: [redacted], Andrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the same extent as nondisabled children.

Annual Goal: *2. The student will improve writing skills as measured by the following objectives:*

Standard/ Access Skill: *Language Arts, 3*

Short-term Objective: *a) Drew will use non-fiction text vocabulary to give written responses to questions.* Start: 04/13/10 End: 04/13/10

Checkpoint: *4 - 6 (3.3): (Conventions) Produces a legible product using conventions for writing such as punctuation, capitalization, standard spelling, and grammar*

Criteria: *>= 80 percent in 3 out of 4 consecutive trials*

Narrative: *Drew will be able to correctly use new vocabulary 80% of the time.*

Baseline: *<= 50 percent*

Narrative:

Methods(s) of Measurement: *Written performance.*

Progress Reporting

Period End: Level: Status:
Comments:

Short-term Objective: *b) Drew will use appropriate conventions (capitals, punctuation) to communicate via e-mail.* Start: 04/13/10 End: 04/13/11

Checkpoint: *4 - 6 (3.3): (Conventions) Produces a legible product using conventions for writing such as punctuation, capitalization, standard spelling, and grammar.*

Criteria: *>= 80 percent in 3 out of 4 consecutive trials*

Narrative:

Baseline: *"0) Does not participate"*

Narrative: *Drew has not yet used e-mail as a regular form of communication.*

Methods(s) of Measurement: *Written performance.*

Progress Reporting

Period End: Level: Status:
Comments:

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Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the same extent as nondisabled children.

Annual Goal: *3. The student will communicate an understanding of number sense as measured by the following objectives:*

Standard/ Access Skill: *Mathematics, 1*

Short-term Objective: *a) Given a variety of coins and dollars, Drew will accurately count money up to $5.00 and then hand over the correct amount counted.* Start: 04/13/10 End: 04/13/11

Checkpoint: *4 - 6 (1.1): Understands value as it relates to positive rational numbers (e.g., 3/4, 1/3, 2/1, 0.75), including terminating decimals through hundredths, commonly-used fractions (i.e., halves, thirds, fourths, fifths, eighths, tenths), mixed numbers, and percents.*

Criteria: *>= 90 percent in 4 out of 4 consecutive trials*

Narrative:

Baseline: *>= 80 percent in 3 out of 4 consecutive trials with >= 3 verbal prompts*

Narrative: *Drew can count money with a variety of coins but is inconsistent.*

Methods(s) of Measurement: *Oral performance, Demonstration/Performance.*

Progress Reporting

Period End: Level: Status:
Comments:

Short-term Objective: *b) When identifying an object Drew wishes to purchase, he will be able to answer the question, "Is that enough money?".* Start: 04/13/10 End: 04/13/11

Checkpoint: *4 - 6 (1.5): Uses oral/written language to communicate an understanding of number sense.*"

Criteria: *>= 90 percent in 4 out of 4 consecutive trials*

Narrative:

Baseline: *<= 50 percent with >= 3 verbal prompts*

Narrative:

Methods(s) of Measurement: *Demonstration/Performance.*

Progress Reporting

Period End: Level: Status:
Comments:

Short-term Objective: *c) Given a word problem, Drew will be able to identify which operation (addition, subtraction, multiplication or division) to use to solve the problem.* Start: 04/13/10 End: 04/13/11

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Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 0914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Academic/Functional Goals and Objectives (con't)

Checkpoint: 4 - 5 (1.5): Uses oral/written language to communicate an understanding of number sense.*
Criteria: >= 90 percent in 4 out of 4 consecutive trials

Narrative:

Baseline: <= 75 percent in 3 out of 4 consecutive trials with >= 3 verbal prompts

Narrative:

Methods(s) of Measurement: Written performance, Oral performance, Demonstration/Performance.

Progress Reporting

Period End: Level: Status:
Comments:

Short-term Objective: d) Drew will learn his multiplication facts 6-10. Start: 04/13/10 End: 04/13/11

Checkpoint: 4 - 6 (1.3): Understands basic mathematical properties (e.g., 2 + [3 + 4] = [2 + 3] + 4, 12 + 2 ' 2 + 12) and how they apply to whole and rational numbers.
Criteria: >= 90 percent in a time period of <= 0 min(s) in 3 out of 4 consecutive trials

Narrative:

Baseline: <= 75 percent in a time period of >= 10 min(s)

Narrative:

Methods(s) of Measurement: Demonstration/Performance.

Progress Reporting

Period End: Level: Status:
Comments:

Short-term Objective: e) Drew will learn his division facts 0-5. Start: 04/13/10 End: 04/13/11

Checkpoint: 4 - 6 (1.3): Understands basic mathematical properties (e.g., 2 + [3 + 4] = [2 + 3] + 4, 12 + 2 ' 2 + 12) and how they apply to whole and rational numbers.
Criteria: >= 90 percent in 3 out of 4 consecutive trials

Narrative:

Baseline: <= 50 percent

Narrative:

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Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Academic/Functional Goals and Objectives (con't)

Methods(s) of Measurement: *Written performance.*

Progress Reporting

Period End: Level: Status:
Comments:

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Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the same extent as nondisabled children.

Annual Goal: *4. The student will improve social communication skills in order to access the general education curriculum as measured by the following objectives:*

Standard/ Access Skill: *Communication and Basic Language Skills*

Short-term Objective: *a) Drew will engage in appropriate turn taking skills by attending to a peer's turn and waiting for his own turn.* Start: 04/13/10 End: 04/13/11

Checkpoint:

Criteria: *"4/5 opportunities" with <= 1 verbal prompts*

Narrative:

Baseline: *"1/5" with >= 3 verbal prompts*

Narrative:

Methods(s) of Measurement: *Demonstration/Performance*

Progress Reporting

Period End: Level: Status:

Comments:

Short-term Objective: *b) Drew will demonstrate 2 appropriate verbalizations during game play (simple board game, bingo, etc) with at least one peer.* Start: 04/13/10 End: 04/13/11

Checkpoint:

Criteria: *>= 2 occurrences with <= 1 verbal prompts*

Narrative: *Each time Drew plays a game with a peer, he will make at least two appropriate comments or questions directed at the peer and that are related to the situation.*

Baseline: *<= 0 occurrences*

Narrative:

Methods(s) of Measurement: *Oral performance*

Progress Reporting

Period End: Level: Status:

Comments:

Short-term Objective: *c) In a small group situation, Drew will answer open ended questions with a topic related response, demonstrating 2 out of 3 successes per opportunity.* Start: 04/13/10 End: 04/13/11

Checkpoint:

Legal Name of Student: [redacted], Andrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Academic/Functional Goals and Objectives (con't)

Criteria: "successful 2/3 times per opportunity"

Narrative:

Baseline: "1/3 successes"

Narrative:

Methods(s) of Measurement: Oral performance.

Progress Reporting

Period End: Level: Status:
Comments:

Short-term Objective: a) Using scripted language, Drew will ask a peer questions. Start: 04/13/10 End: 04/13/11

Checkpoint:

Criteria: "at least 3 successes per opportunity"

Narrative:

Baseline: <= 1 success

Narrative:

Methods(s) of Measurement: Oral performance.

Progress Reporting

Period End: Level: Status:
Comments:

Short-term Objective: e) Drew will advocate for himself in the school environment by indicating his needs. Start: 04/13/10 End: 04/13/11

Checkpoint:

Criteria: "3) Performs activity with verbal/gestural cues" in 4 out of 5 consecutive trials

Narrative:

Baseline: "0) Does not participate"

Narrative:

Methods(s) of Measurement: Oral performance, Demonstration/Performance.

Progress Reporting

Period End: Level: Status:
Comments:

Legal Name of Student: [redacted], Andrew Robert LASID: 122955 SASID: 6814080767
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the same extent as nondisabled children.

Annual Goal: *5. The student will improve his motor skills as related to academics as measured by the following objectives:*

Standard/ Access Skill: *Physical*

Short-term Objective: *a) To demonstrate functional motor skills and to provide an opportunity for independent sensory input, Drew will utilize the playground swings.* Start: *04/13/10* End: *04/13/11*

Checkpoint:

Criteria: *"3) Performs activity with verbal/gestural cues" in 3 out of 4 consecutive trials*

Narrative:

Baseline: *"2) Participates with partial physical assistance"*

Narrative: *Drew can climb onto the swing but is unable to pump to begin and maintain a swinging motion.*

Methods(s) of Measurement: *Demonstration/Performance.*

Progress Reporting

Period End: Level: Status:

Comments:

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Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the same extent as nondisabled children.

Annual Goal: *6. The student will learn and utilize age appropriate coping strategies when feeling anxious and seek adult support when needed as measured by the following objectives:*

Standard/ Access Skill: *Inter- / Intrapersonal*

Short-term Objective: *a) Drew will use a structured format to identify the cause of his stated feeling.* Start: 04/13/10 End: 04/13/11

Checkpoint:

Criteria: *>= 70 percent with <= 2 verbal prompts*

Narrative:

Baseline: *<= 25 percent with >= 5 verbal prompts in 1 environment(s)*

Narrative:

Methods(s) of Measurement: *Demonstration/Performance.*

Progress Reporting

Period End: Level: Status:
Comments:

Short-term Objective: *b) Drew will learn to identify and indicate accurately his "engine is high."* Start: 04/13/10 End: 04/13/11

Checkpoint:

Criteria: *>= 75 percent with <= 2 verbal prompts*

Narrative:

Baseline: *"0) Does not participate"*

Narrative:

Methods(s) of Measurement: *Demonstration/Performance.*

Progress Reporting

Period End: Level: Status:
Comments:

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Legal Name of Student: [redacted], Andrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the same extent as nondisabled children.

Annual Goal: *7. The student will participate in a developmentally appropriate job in an educational setting as measured by the following objectives:*

Standard/ Access Skill: *Inter- / Intrapersonal*

Short-term Objective: *a) Drew will demonstrate knowledge of peers' names as related to his job.* Start: 08/09/10 End: 04/13/11

Checkpoint:

Criteria: *>= 70 percent with <= 2 verbal prompts*

Narrative:

Baseline: *<= 70 percent with >= 3 verbal prompts*

Narrative: *Drew can identify peers names by pictures only*

Methods(s) of Measurement: *Demonstration/Performance.*

Progress Reporting

Period End: Level: Status:

Comments:

Douglas County School District Re.1 - Special Education Department
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0080

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Special Education, Related Services & Supplementary Aids/Services

Accommodations / Modifications:

Describe the unique accommodations/modifications necessary for the student to participate in the general education curriculum, as well as, nonacademic and extra curricular activities considering the identified needs of the student.

Systematic instructional techniques, visual and/or written schedules as needed, movement and sensory breaks, clear rewards for meeting expectations or finishing work, clear consequences for undesired behavior, use of social stories/social movies

Service Delivery:

Specific services needed to address goals and objectives:
Significant support needs classroom with instruction from a special education teacher and support from a para-educator, speech/language intervention, occupational therapy, and mental health support.

Special Education Services:

	Service Coordinator	#2	#3	#4	#5
Type of service provider (assignment)	SSN/para	OT staff	MH	SLP/SLPA/E	
Projected beginning date of service	04/13/10	04/13/10	04/13/10	04/13/10	
Projected ending date of service	04/13/11	04/13/11	04/13/11	04/13/11	
	Hours of Special Education Services per Week by Service Provider				
Indirect (consultation)					
Integrated services in general classroom	15				
Direct outside general classroom	20	0.5	0.5	1	
Total hours by provider	35	0.5	0.5	1	

Note: Additional information may be provided on Comments page.

Other IEP Services:
(such as supplementary aids and services)

	Description	Hrs. per week
Parent Follow-up Activities		
Preschool Integrated Education Program		

Does the student require:

Special transportation?	☐ Yes	☒ No
A literacy/modality plan? (For Vision Disability)	☐ Yes	☒ No
A communication plan? (For Hearing Disability)	☐ Yes	☒ No
A behavior plan?	☒ Yes	☐ No
A health care plan?	☒ Yes	☐ No
Assistive technology? (If yes, describe):	☐ Yes	☒ No

Extended School Year? ☐ Yes ☒ No ☐ To be determined by: _____
(Rationale for decision)

Significant regression with lack of reasonable recoupment time is not anticipated following school breaks.

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Douglas County School District Re.1 - Special Education Department
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0060

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Summit View Elementary Date of Meeting: 04/13/10

Special Education, Related Services & Supplementary Aides/Services

Recommended Placement in Least Restrictive Environment (LRE):

How much time is student only with students with disabilities? 55% or as behavior allows

Setting Code: 303 Inside the Regular Class Less than 40% of the Time

Why? This setting best meets his needs & allows him to receive maximum benefit in the LRE.

Involvement of Student in State and District Assessments:

(a) What state and district assessments of student achievement will the student be taking?

☐ CSAP ☒ CSAP-A ☐ Other:

(b) What accommodations, if any, will be provided to the student related to the administration of the assessments of student achievement? Accommodations must be a regular part of student's IEP.

All accommodations in this IEP and allowed by the assessment tool. May include, one on one instruction, simplify verbal directions as allowed per test design, written directions/picture cues as allowed

(c) If the student will not participate in said assessments, why not?

(d) How will the student be assessed?

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(303) 387-0080

Legal Name of Child/Student: [redacted] *Endrow Robert* Date of Meeting: *04/13/10*
Birthdate [redacted] C.A.: [redacted] LASID: *122955* SASID: *6914080767*

INDIVIDUAL LITERACY PLAN / COLORADO BASIC LITERACY ACT SUGGESTED PARENT/FAMILY INTERVENTIONS

The following suggested checklist of parent/family literacy interventions are not required by Special Education law, but are based upon Colorado Basic Literacy Act (CBLA) requirements:

Elementary School Level

Primary Level: Parent privides support outside the school day.

- ☐ Read to the child each day.
- ☐ Read with the child each day.
- ☐ Talk with the child about what they are reading and/or watching.
- ☐ Encourage child to use reading for a variety of reasons (recipes, lists, etc.).
- ☐ Write for a variety of reasons (cards, letters, journals, etc.).
- ☐ Practice alphabet letter identification and letter sounds with the child.
- ☐ Practice reading high frequency word cards with the child.
- ☐ Monitor the child's homework.
- ☐ Other:

Intermediate Level: Parent provides support outside the school day.

- ☑ Read to the child each day.
- ☐ Read with the child each day.
- ☑ Talk with the child about what they are reading and/or watching.
- ☐ Encourage child to use reading for a variety of reasons: recipes, newspapers, magazines, lists, letters, etc.).
- ☑ Monitor the child's homework.
- ☑ Attend parent/teacher conferences.
- ☐ Provide additional support in the following ways:

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Douglas County School District RE-1
620 Wilcox Street
Castle Rock, Colorado 80104
Phone: (303) 387.0080
FAX: (303) 387.0119

Prior Written Notice

Date of Meeting: *04/13/10*	Date PWN was sent to Parent(s): *04/15/10*	
Student: [redacted] *Andrew Robert*	Date of Birth: [redacted]	SASID #: *6914080767*

Prior Written Notice is provided when an action is considered regarding the initiation or change of the identification, evaluation, or educational placement of a student. Prior Written Notice is given when an IEP is reviewed or revised.

☐ Initial Evaluation ☐ Eligibility Determination ☐ Initial Placement ☒ IEP Review/Revision
☐ Change of Program of Placement ☐ Reevaluation Meeting ☐ Manifestation Determination
☐ Other (Please explain): _____

Description of the action proposed or refused
The team proposes to:
Reviewed and revised students Special Education program.

Why this action was proposed or refused:
Federal regulations require annual review of student's IEP

Description of each evaluation procedure, test, record, or report used as basis for proposed or refused action:

☒ Data from Evaluations ☒ Teacher report/data ☒ Parent report/data ☐ Review of education records
☒ Classroom observation ☒ IEP(s) ☐ Medical information ☒ Work samples
☐ Other data: _____

Description of other options considered and the reasons why those options were rejected:
No other options were considered.

Description of any additional factors that are relevant to the proposal or refusal:
☒ No other factors were relevant at this time.
☐ Relevant factors: _____

Date this action will commence
Effective: *Apr 13, 2010*

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Douglas County School District Re.1 - Special Education Department
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0060

NOTICE OF MEETING

Apr 2, 2010
Current Date

[redacted] Andrew Robert	[redacted]	[redacted]	SVE	4	122955	122955
Legal Name of Child/Student	Birth Date	C.A.	School	Grade	LASID	SASID

Dear Mr. and Mrs. [redacted]:

A meeting has been scheduled to review and discuss your child's educational needs. The specific purpose of this meeting is indicated below. If the meeting is for a student who is 15 years of age, in the 8th grade, or older, and in some cases as early as 14, post school transition planning will be discussed.

TO DETERMINE ELIGIBILITY FOR SPECIAL EDUCATION:

☐ AN INITIAL MEETING TO DETERMINE ELIGIBILITY AND DISABILITY: The purpose of this meeting is to discuss the assessments that have been completed; determine whether your child is in need of special education services, and if the need exists, how those services can be provided; and to develop an individualized education program (IEP) for your child.

☐ TRIENNIAL MEETING TO DETERMINE ELIGIBILITY AND DISABILITY: The purpose of a triennial review is to discuss the assessments that have been completed; determine whether your child continues to be in need of special education services, and if the need exists, how those services can be provided; and to develop or revise an existing IEP for your child.

IEP REVIEW:

☒ ANNUAL REVIEW: The purpose of this meeting is to discuss the assessments that have been completed and, if appropriate, consider reevaluation to review and update your child's present levels of functioning, needs, goals and objectives, and develop a plan to provide special education and related services.

☐ OTHER REVIEW: _____

The following will be attending the meeting:

- ☐ student
- ☒ a special education teacher
- ☒ a general education teacher or counselor
- ☒ a school psychologist
- ☒ the principal of your child's school, or designee
- ☒ a school nurse
- ☐ post secondary service provider (permission to invite required)
- ☐ other: _____
- ☒ a school social worker
- ☒ a speech/language specialist
- ☒ an occupational and/or physical therapist
- ☒ the Director of Special Education or designee
- ☐ an audiologist

The meeting is scheduled for Apr 13, 2010 (Date) at 12:00 pm (Time)

at the following location Summit View Elementary School Conference Room

We encourage you to attend and participate in this meeting. You may invite other people that you believe will be helpful to you. If you do invite other people to the meeting, please notify in writing so the School District can make any necessary arrangement for space and personnel. Also, please feel free to bring to the meeting any relevant information about your child that you would like the IEP team to consider. If the scheduled time and place is not convenient, please contact me immediately so that we can arrange a mutually agreeable time and location for the meeting.

Your "DCSD Educational Rights of the Student/Parent" are provided with this notice. ☒ Yes ☐ No

Diane Bruun SPED ASST — Signature and Title

303-387-6823 — Telephone Number

Original - Special Education Department (Rev. 8/2009) — Copies - Parents/guardians, School

Student Name: Ezekiel [redacted] LASID: 122955 Case Manager: Amy Holton

IEP Compliance Checklist

Meeting

Type of Meeting: (check one) ☐ Initial ☑ Review ☐ Reevaluation ☐ Transfer ☐ Other: _____ (e.g. Manifestation Determination)

*If this is a Transfer Meeting, send copies of the previous IEPs with this completed IEP Packet

Meeting Deadline Date:	4/14/10	Date Requested by Parent:		Actual Date of Meeting:	4/13/10

Participants

General Education Teacher:	Kathryn Reah	SPED Administrator/ Designee:	Robin Kessel
Other Attendees:	See pg 2		

Directions: Check each aspect of the IEP process. As you review the process, check for both accuracy and completion.

	Action	Pg	Date Completed	Initials	Comments
Eval Consent	a. Referral for SPED Eval				
	b. Parent Rights Provided		4-13-10	RK	
	c. Review of Existing Assessment				
	d. Additional Assessment Determined				
	e. Initial or Re-evaluation Permission to Assess (Signed and Date received)				
Notice	a. Written Notice Provided (before meeting) to Parent		4-13-10	RK	
	b. Notice of Meeting to student (15 years or older)				
IEP Meeting Process	a. Signature Page Completed		4-13-10	RK	
	b. Current Levels Class Observations: Educational		4-8-10	RK	
	Communicative		4-8-10	RK	
	Pertinent Family Information				
	Social/Emotional		4-16-10	RK	
	Cognitive				
	Current Health				
	Physical/Motor		4-8-10	RK	
	Life Skills/Career/Transition				
	c. Educational Needs Indicated		4-13-10	RK	
	d. Eligibility Determination) (Initial/Reevaluation)				
	e. Goals and Objectives Addressing Needs, How Measured & Reported		4-13-10	RK	
	f. Accommodations Related to Disability		4-13-10	RK	
	g. Determine SPED Services, Related Services, Supplemental Aids & Services: hours, frequency, duration		4-13-10	RK	
	h. ESY Eligibility		4-13-10	RK	
	i. LRE Statement		4-13-10	RK	
	j. Involvement in State and District Assessment		4-13-10	RK	
	k. Transition Plan (15 or older)				
Completion	a. IEP Audit by Team Leader		4-15-10	RK	
	b. Finalize IEP document		4-15-10	RK	
	c. Prior Written Notice (after meeting)		4-15-10	RK	
	d. Copy of IEP Provided to Parents		4-15-10	RK	
	e. Completed IEP sent to District Office Include Sig. Pg and Notice of Meetings! (CIPP for DHH for initial/re-avals)		4-15-10	RK	

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Douglas County School District Re.1 - Special Education Department
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0080

~~DRAFT~~ Final Di

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Date of Meeting: 11/16/10

Individualized Education Program (IEP) for [redacted] Andrew Robert

Student Information

DOB: [redacted]	LASID: 122955	SASID: 6914080767	Medicaid #:
Home School: Summit View Elementary		School of Attendance: Alta Vista	
Grade: 3 Track: Mod.		Ethnicity: White (not Hispanic)	
Age: [redacted] Gender: M		English Language learner? ☐ Yes ☒ No	

Parent Information

Parent/Guardian	Parent/Guardian
Last Name: [redacted]	Last Name: [redacted]
First name: Joe	First Name: Jennifer
Address: [redacted]	Address: [redacted]
City: [redacted]	City: [redacted]
State: CO Zip: [redacted]	State: CO Zip: [redacted]
Home Phone: [redacted]	Home Phone: [redacted]
Work Phone:	Work Phone: [redacted]
Relationship to Student: Father	Relationship to Student: Mother
Primary Language: English	Primary Language: English

Special Education Information

Date of Initial Eligibility Meeting: 06/25/02 (month/day/year)

Date of Last IEP Review: 04/13/10 (month/day/year)

Date of Next Eligibility Meeting: 04/29/11 (month/day/year)

Date of Next Annual Review: 11/16/11 (month/day/year)

Reason for Meeting: ☐ Initial ☐ Triennial ☒ Annual ☐ Other:

Primary Disability: Physical Disability / Autism

Setting Code: 303 (L.M 41)

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EXHIBIT 5

Douglas County School District Re.1 - Special Education Department
620 Wilcox St. Castle Rock, CO 80104
(303) 387-0080

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Vista Date of Meeting: 11/16/10

Participants in Meeting

Initials indicate participation only.

The following participants must be in attendance:
(please print name and initial if you are in attendance at the meeting.)

Jennifer [redacted] — Student's Parent/Surrogate Parent *(unless parent decided not to attend)*

[redacted] — Student's Parent *(unless parent decided not to attend)*

I have received my "Procedural Rights" within the last calendar year: _____ (Parent initials)

Don Bell/Cora Nash CN — Special Education Director/Designee

Amy Holton AH — Special Ed. Teacher / S/L Pathologist

Beth Mann BM — General Education Teacher *(if the student is or may be participating in the general education environment)*

Student *(when appropriate)*

Jennifer Murtha — Building Principal / Designee *(for eligibility only)*

Interpreter *(when appropriate)*

Others with knowledge and expertise regarding this student:

Robin Kessel RK — Speech / Language Pathologist

School Nurse

Katherine Lennen KL — Occupational Therapist

Physical Therapist

Anne Balducki AB — School Psychologist

Nicole Breuer NB — School Social Worker

Audiologist

School Counselor M Slack-Eden/C Scott/S David-Alta Vista

J Konrade-Helm/S Houston-Advocates — Other *(specify area represented)*

Other *(specify area represented)*

Non-Attendee

Non-Attendee

Non-Attendee

Non-Attendee

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Douglas County School District Re.1 - Special Education Department
620 Wilcox St, Castle Rock, CO 80104
(303) 387-0060

DRAFT

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080787
School of Attendance: Alta Vista Date of Meeting: 11/16/10

Present Level of Academic and Functional Performance/Achievement

Background/Historical Data
(Family and medical history, patterns of strength/weaknesses in academic, social/emotional/behavioral functioning)

Summary of Outside Background/Historical data from Alta Vista Center for Autism

Endrew, or Drew as he is commonly called, is a 5th grade student who is diagnosed with Autism. He attends Alta Vista, a private school in Denver which specializes in Autism. He attended Heritage Elementary from kindergarten through 2nd grade then transferred to Summit View Elementary where he attended 3rd and most of 4th grade. He withdrew from Summit View on May 7, 2010 and enrolled at Alta Vista at that time. Drew was serviced through the Significant Support Needs (SSN) program while attending Douglas County Schools. He also was on medication and received related services of mental health, occupational therapy, and speech/language therapy. A behavior plan meeting was scheduled for May 10, 2010 and a draft Behavior Intervention Plan was prepared. Mrs. [redacted] chose not to attend this meeting. This draft plan is attached to the IEP.

Alta Vista completed several assessments from May through September 2010. Alta Vista provided a summary of the VB-MAPP dated July 2010. This summary indicates that Drew's strengths include basic use of all verbal operants and that his academic skills are intact. Weaknesses were reported as Drew's use of verbal operants in which social interaction is required. He reportedly also does not answer "wh" questions on one topic in basic conversation. Additionally, Alta Vista's summary reports that Drew demonstrates deficits in play, social interaction and group instruction. He does not engage in movement play or independently engage peers in play. At the time the summary was provided, Drew was not participating in group instruction. Alta Vista's goals, based on the Verbal Behavior Map, for Drew's 5th grade year were summarized as increasing the social nature of Drew's language to include conversation skills, making requests and increasing social and play routines with adults and peers.

Information from triennial of April 2008 completed by Caroline Waddell, Social Worker

No updated information in the areas of family, or health (see nurse's report). Drew's mother's main request is more support in the areas of mental health. Because Drew is a sensory child, she suggests a recess group where upon he could sign up with one buddy per week to play with. This would need to be monitored by an adult. He enjoys physical sensory type things such as hide and seek or playing the game tag. All of his interactions would not need to be question driven with his peers. The focal point would be the involvement/ interactions at recess. Also, if the schedule permits, Drew could follow recess with the same buddy or buddies to have lunch. Again this would need to be guided by an adult to foster conversation (most likely about the events of recess). Repetition will be key for Drew to establish a social routine. Mental health support could also include a small group focusing on eye contact, turn-taking, game-playing and even possible social stories.

Information from May 2005 Preschool Assessment:

Home visit with Mrs. [redacted]
Record review
Team consultation

Drew has been attending preschool at the Rock Canyon site 4 days/wk and enjoys going to school. This is Drew's third year with the preschool program. Mrs. [redacted] continues to be pleased with Drew's developmental progress. He is typically using 3 word phrases (and some 4 word phrases) to convey his needs/wants (e.g.,

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Legal Name of Student: [redacted] Andrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Vista Date of Meeting: 11/16/10

Present Level of Academic and Functional Performance/Achievement

"mommy, sit down"). Drew's mom feels the ideas that he is able to verbalize have expanded and become more complex. He is also doing more verbal commenting during his play. In the area of language, the [redacted] top current priority is Drew's articulation errors which increase when he is excited and talking rapidly. Drew seems to be more receptive to interactions with peers and now his family would like to see him using his language in these social interactions. Drew continues to enjoy and do well with gross motor activities and has less interest in the fine motor activity of writing. Drew is able to write his name and draw some simple shapes; his mom remains concerned about his tool grip. Drew continues to participate in private treatment that includes 9 hrs/wk of home training and 3 hrs/wk of an integrated play group with Annette Nunez. Since 10/04 Drew has been taking Ritalin and his mom feels it has decreased his impulsivity and improved his body control. The Vineland Adaptive Behavior Scales was completed with Mrs. [redacted] to assess Drew's adaptive skills and yielded the following results:

DOMAIN	STANDARD SCORE	PERCENTILE RANK	ADAPTIVE LEVEL
Communication	72	3	Mod. Low
Daily Living Skills	64	1	Low
Socialization	68	2	Low
Motor Skills	84	14	Mod. Low
Overall Composite	66	1	Low

Drew's overall adaptive skills are at the 1st percentile when compared to peers which is consistent with a diagnosis of Autism Spectrum Disorder. Mrs. [redacted] has noticed some increased rigidity from Drew recently around having to take the same route to school and get out of the car on a specific side and hopes he can gain some more flexibility. Mrs. [redacted] is eager to learn more details about Drew's transition to kindergarten including what steps can be taken to increase Drew's success in his process and what schedule will be utilized to help him with the routine in the new setting. The [redacted] have been terrific advocates for Drew's educational needs and proactive in utilizing school, private and community resources to support Drew's progress.

Current Instructional Plan

(Include interventions implemented e.g., frequency, duration, grouping; instructional strategies used)

Drew currently attends school at Alta Vista Center for Autism. The services outlined below contain a description of the instructional plan that he was participating in at Summit View until May 7, 2010 when he was withdrawn from Douglas County School District.

Typically Drew spends 3.2 hours in his general education setting per day. This time fluctuated depending on Drew's behavior. His time in general education is spent in his classroom and attending specials, and recess/lunch with his peers. Drew attends all but 30 minutes of his time in general education with a para-educator. Drew has benefited from joining his class in the mornings where he takes part in the morning routines. He also uses part of this time to work on name/face recognition of his classmates and take part in a scripted daily conversation with his general education teacher. The 30 minutes of unsupported time is during class read aloud/snack. Drew also attends his class for social studies and science, where he participates in modified activities. The last 30 minutes of the day are also spent in the general education classroom where Drew uses his earned computer time and participates in the packing up routine of the class. Additionally Drew was fully included in scheduled class meetings with his grade level peers, as well as classroom celebrations. The rest of Drew's day is spent in the self-contained SSN classroom, where he receives the majority of his literacy and math instruction. Drew benefits from the lower ratio of students and the 1 on 1 academic instruction of the SSN program. Drew also needs opportunities for sensory breaks, small group instruction in social skills and classroom behavior, and an opportunity to work on organization, self help and independent skills. In addition, Drew receives Speech Language services for one hour a week, OT for 30 minutes a week, and mental health for 30 minutes per week.

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Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Vista Date of Meeting: 11/16/10

Present Level of Academic and Functional Performance/Achievement

Evaluations Administered/Date/and/or Information Reviewed

Classroom Observation (Other than classroom teacher)	Evaluator	Date of Evaluation
	Nicole Breuer, LCSW	Apr 6, 2010

On Tuesday, April 6, a 20 minute observation of Drew in his general education classroom occurred. The class was involved in group work and students were focused on the document camera at the front of the room. The teacher was reviewing student writing as a class. It was noted the students in the class were involved in the activity. They were participating by listening, making comments, and observations. During this observation Drew was seated at his desk quietly. He was coloring on a piece of paper with markers. When the teacher asked a question of the class, Drew would look up and look around the classroom, and then when another student began talking, Drew would refocus on either his drawing, or his marker. At times it was noted Drew would look up and reference the room and re engage with his activity without participating in the group work. During this observation, Drew sat quietly at his desk, he was respectful of his peers' learning environment. He did not disturb others. He swung his feet back and forth, took the marker cap on and off, and picked at his fingers.

On Monday, November 8, 2010, Amy Holton and Robin Kessel observed Drew at Alta Vista for 45 minutes. During the observation Drew, worked one on one with a teacher.

Academic Skills	Evaluator	Date of Evaluation
	Amy Holton, SSN Teacher	Nov 5, 2010

Current information is based upon:
File Review
Observation
Data Collection/Informal assessments
Consultation with Staff
Review of Report from Alta Vista Center for Autism

Summary of Outside Education Evaluation - conducted 5-15-2010 by Maura Stack-Oden, for the Alta Vista Center for Autism

Summary of Woodcock-Johnson III Achievement Test:
Endrew's English oral language skills are very low when compared to others at his grade level. His English oral expression skills are low average; his English listening comprehension skills are very low. His overall level of achievement is low. Endrew's academic skills are low average. His academic knowledge, fluency with academic tasks, and ability to apply academic skill, are within the very low range.

When compared to others at his grade level, Endrew's performance is low average in basic reading skills and math calculation skills; low in basic writing skills; and very low in broad reading, reading comprehension, math reasoning, and written expression. His knowledge of phoneme-grapheme relationships is low.

Information reported at previous IEP Meeting (4-13-2010) The information reported below is a summary of Drew's Academic skills as of April 13, 2010.

Reading: Drew does best when reading with a 1:1 ratio. He continues to need support for comprehension and retelling. Drew's ability to word call remains higher than his ability to comprehend. Drew needs visual aides to help with comprehension.

Writing: Writing tasks have to be broken down into small steps using visual support. Drew often needs a

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 6914080787
School of Attendance: Alta Vista Date of Meeting: 11/16/10

Present Level of Academic and Functional Performance/Achievement

great deal of prompts to write. This is best accomplished in a 1:1 setting.

Math: This area continues to be a strength for Drew. He is strong with his computation skills and often uses this as a way to calm down. As more language, reasoning, and problem solving is introduced into the math curriculum, Drew continues to need more support. He continues to work on word problems and life skills math.

Communication Skills	Evaluator	Date of Evaluation
	Robin Kessel, MA CCC-SLP	Oct 27, 2010

Current information is based upon:
File Review
Observation
Data Collection/Informal assessments
Consultation with Staff
Review of Report from Outside Speech Language Consultation

Summary of Outside Speech Language Evaluation - conducted 9-15-2010 by Francine Alberts, MA CCC-SLP, for the Alta Vista Center for Autism

Drew's articulation skills were found to be characterized by numerous sound substitutions (w/l, f/th, b/v and w/r). His voice quality was noted to be high in pitch. These characteristics, combined with the presence of off topic comments that may lack contextual referents, were found to impact Drew's listeners' abilities to understand him.

Drew's language skills were evaluated by Ms. Alberts using select subtests from formal language tests, as well as informal language tasks. He was administered the following standardized measures:

Comprehensive Assessment of Spoken Language

Subtest	Age Equivalent
Antonyms	about 6 years
Synonyms	about 6 years
Sentence Completion	3 years, 8 months
Grammatical Morphemes	6 years, 5 months

Clinical Evaluation of Language Fundamentals - 4th Edition

Subtest	Age Equivalent
Concepts & Following Directions	4 years, 2 months

Difficulties were observed with use of verb tenses, some pronouns, and grammatical structures that add meaning to words. Drew also experienced difficulties with comprehension of longer, more complex language forms. His word knowledge at the single word level was found to be stronger.

During informal tasks, Drew was able to give basic information to describe items, answer simple WH questions in response to a story and follow simple one step directions. Weaknesses were noted in answering yes/no questions, use of complex grammatical forms, understanding of prepositions and other language concept words.

Information reported at previous IEP Meeting (4-13-2010)
The information reported below is a summary of Drew's communication skills as of April 13, 2010.

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Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Vista Date of Meeting: 11/16/10

Present Level of Academic and Functional Performance/Achievement

Drew's difficulties with communication are primarily in the areas of social/pragmatic language skills. He has learned to consistently greet adults and classmates, but typically does not extend conversation beyond that level. Drew will respond to scripted conversational exchanges with verbal prompting, but struggles with spontaneously responding to questions or preceding utterances from others. Drew is most successful when interacting with familiar adults. Spontaneous peer interactions remain challenging for him. When Drew does spontaneously make comments or respond to questions, his remarks are often off-topic, and reflect whatever is on his mind at that moment. When asked Yes/No questions, Drew's instinct is to answer "Yes", even when a "No" answer is appropriate (ex. "Do you have a sister?"). Giving Drew choices to select from when answering WH questions increases his level of success. Drew has difficulties verbalizing discomfort and at times struggles with relaying his needs/wants, resulting in frustration and acting out behaviors. Vocabulary skills are a strength for Drew, in terms of his ability to label pictures, objects and words related to targeted content. His speech is characterized by a few sound substitution errors, but they do not impact his overall speech intelligibility.

Communication Rating: V = 0 F = 0 A = 0 RL = 0 EL = 0 PL = 0 Total CRS = OR FC = 4
Comment: Functional Communication Rating = 4 (severe rating)

Cognitive Functioning	Evaluator	Date of Evaluation
	Anna Balducki, MS. Ed.	Oct 28, 2010

File review:
An evaluation was completed by Alta Vista Center with individual assessments dated from May through August 2010. There were no cognitive evaluations included in the information sent to Summit View Elementary in October 2010.

Information from April 2008 Triennial evaluation completed at Heritage Elementary: Cognitive Assessment done by Hugh Redford, School Psychologist;
The School Function Assessment (SFA) is used to measure a student's performance of functional tasks that support his/her participation in academic and social aspects in school grades K-6. The SFA is comprised of 3 parts:

Part 1-Participation. Examines a student's level of participation in 6 major school settings: regular or special ed classroom, playground/recess, transportation to/from school, bathroom, transition to/from class and mealtime.

Part 2-Task Supports. Examines the supports provided when the student performs school related activities. The 2 types of supports examined are: Assistance (adult help), and Adaptations (modifications to the environment) such as adapted materials or specialized equipment.

Part 3-Activity Performance Examines the student's performance on specific school related functional activities. Activities include: Functional Communication, Memory and understanding, Following social conventions, Compliance with directives and school rules, Task completion, Positive interaction, Behavior regulation, Safety and Personal care awareness.

Drew was rated by an SSN para professional. Drew requires Extensive to Moderate assistance and adaptations on all cognitive/behavioral tasks with the exception of the memory and understanding area where he needs only minimal assistance and adaptations.

Drew is able to communicate yes/no, acceptance/refusal or a choice between two or more items with consistent performance. On the other hand, he rarely advocates for himself when he needs help with a functional academic tasks such as opening a container or where he would go if he were lost.

Drew's personal strength is in the area of memory and understanding. For example, he is able to remember daily routines and basic one step directions such as stop, come here and get book with consistent performance. Additionally, Drew consistently demonstrates an ability to follow a series of three or more related instructions (such as put things away, put on your coat, and line up).

Drew is inconsistent in the area of following social conventions. For example he will often use

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Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Vista Date of Meeting: 11/16/10

Present Level of Academic and Functional Performance/Achievement

words such as please, thank you and sorry when appropriate but does not recognize how and when to communicate private matters such as a toileting accident.

Compliance with adult directives and school rules are significantly below that of same aged peers. While Drew generally will observe rules around movement around the classroom/school, when he is in a state of obsession/compulsion usually around timers and watches, he has difficulty responding to redirection and will not stop immediately when instructed to do so.

Drew requires significant assistance from others to maintain his safety, task completion, personal care and behavioral regulation.

The Universal Nonverbal Intelligence test (UNIT) was attempted with Drew. The examiner is not allowed to use words to demonstrate the tasks. While Drew picked up on many of the nonverbal gestures such as wait and begin, his attention to task and fleeting eye contact made his subtest score invalid.

Information from May 2005 Preschool Assessment:
Classroom observation, review of records, update of information from teacher, Kaufman Brief Intelligence Test (K*BIT). In February of 2004, Drew's cognitive development was evaluated at the request of his mother and pediatrician (please see separate report). At that time, the Differential Ability Scale (DAS) was attempted but only partially successful. In the classroom, Drew's behavior and attention was nicely developed for familiar tasks and his behavior during testing was atypical for him, but indicative of being taken out of his routine and presented with novel tasks. Drew participated with the verbal items but his attention and behavior prevented completion of the nonverbal items. Verbally on the DAS, Drew's concept knowledge (Naming Vocabulary T = 33) was significantly stronger than his understanding of more abstract verbal information (Verbal Comprehension T=24) and his overall verbal thinking skills were significantly delayed for his age (Verbal SS = 64). Understanding relationships in pictures was challenging for Drew as well (Picture Similarities T=24). Drew's direct matching skills were strong but matching based on similarities or simple categories was a challenge for him. The Developmental Observation Checklist System (DOCS) was completed by Drew's teachers to determine the validity of the DAS. Drew's cognitive development, as reported by his teachers responses on the DOCS, continued to show a pattern of significant delay (SS=64) that was consistent with the DAS and approximated the 23 month age level. Although his scores were more indicative of a 2 year old, Drew's teachers felt that with facilitation and a familiar routine, his functioning in the classroom was more like a new 3 year old. Currently, Drew is functioning within the Below Average range of intelligence at the 8th percentile (SS=79) on the K*BIT. His true score should fall within the range of 69-89 with 95% accuracy. This is somewhat improved from his performance last year on the DAS and the DOCS, which may be attributed to his being on Ritalin. Drew's vocabulary knowledge was Below Average (SS=75), as were his nonverbal reasoning skills (SS=87). Although on Ritalin, Drew was extremely distractible during this assessment, which negatively impacted his performance. He appeared stressed to be out of his class and routine, often looking into the class and repeating whatever was being said in class. Even given his distraction, this appears to be a fairly accurate estimate of Drew's current level of thinking based on his classroom performance and teacher report.

Social/Emotional/Behavioral Functioning	Evaluator	Date of Evaluation
	N. Braeuer / A.Balducki	Oct 28, 2010

File review:
Evaluations completed through Alta Vista included the Vineland Adaptive Behavior Scales, Second Edition (Vineland II). The Vineland II assesses adaptive behavior in four domains, communication, daily living skills, socialization, and motor skills.

Results from Vineland II completed by Mrs. [redacted] on June 2, 2010 administered by Maura Stack-Oden: The Adaptive Behavior Composite was not able to be calculated due to two or more uncalculated sub domain scores. The area of Communication yielded a standard score of 72 which is at the 3rd percentile with an adaptive level of Moderately Low. Drew's Maladaptive Behavior was also assessed and found to be at the

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Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Vista Date of Meeting: 11/16/10

Present Level of Academic and Functional Performance/Achievement

Clinically Significant level. Critical items identified were his obsession with objects or activities, consistently preferring objects to people, and using bizarre speech.

Results from Vineland II completed by Maura Stack-Oden, teacher at Alta Vista, on July 19, 2010:

Composites	Standard Scores	Percentile	Adaptive Level
Communication	65	1	Low
Daily Living Skills	56	<1	Low
Socialization	53	<1	Low
Motor Skills	No information reported		
Adaptive Behavior Composite	56	<1	Low

According to these results, Drew's adaptive skills are low overall indicating marked impairment in age-appropriate communicative, social, and personal functioning. In the communication domain, Drew has low skills in using words and sentences and moderately low skills in reading and writing. In the area of Daily Living Skills, Drew's skills are low in taking care of personal needs and hygiene, understanding money, time, and math, following rules and routines. In the Socialization Domain, Drew's skills are low in play and leisure time. His coping skills and interpersonal relationships were also low, the latter being less developed.

Information reported at previous IEP Meeting (4-13-2010)

The information reported below is a summary of Drew's social/emotional/behavioral functioning as of April 13, 2010. Nicole Breuer, LCSW:

Classroom observation, participation in social language group, teacher, and educational assistant report

Drew is a 10 year six month old boy in fourth grade. His progress is being updated as part of his annual review of his individual education plan. Drew has made some progress socially in an educational setting. Drew greets classmates and familiar staff by name; he will look at the person he is speaking to, more with prompting than without. Drew does not appear to reference other peers in the general education setting, nor on the playground setting. A voluntary playground sign up sheet was introduced to Drew's general education class. When reviewing the sign up sheet students have signed up in all slots. However, according the para, who is with Drew during the recess time, the students who are signed up are not approaching Drew to interact for the first five minutes of recess. Drew requires prompting to engage with a peer when they speak to him, however with adults, Drew is more likely to greet without prompting.

In social group with eight SSN peers, Drew does a nice job participating with other students. With support, Drew is able to have up to two exchanges with peers, i.e., "what is your favorite game?" and waiting for response. He is working towards making a comment on the information he hears. He does a nice job staying in his personal space. He would benefit from additional facial referencing and learning joint attention and other social communication cues. Drew is learning the social rules for communicating with others. Drew does a nice job taking turns with adults when playing a game, but needs more prompting when playing games with other students.

Concerning behaviors: As of spring of 2010, the school team had a number of concerns regarding Drew's behavior. Based on our data, Drew struggles to express his thoughts/ emotions, appears to avoid non-preferred task demands, and is sensory seeking. When upset by events that occur in the home, with academics, or possibly with others in his environment, Drew reacts to such feelings by yelling, dumping shelves and objects from shelves, disrobing or ripping his clothes, kicking walls, running, and pretend falling. At times, Drew will also entangle himself in chairs and other furniture. This behavior is inhibiting him from accessing academic learning as well as social learning. Drew exhibits this behavior between 8:45 and 10:00 in the morning.

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Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Vista Date of Meeting: 11/16/10

Present Level of Academic and Functional Performance/Achievement

It appears Drew would benefit from ongoing support with social stories in appropriate school behavior, as well as learning how to regulate his emotions.

Physical	Evaluator	Date of Evaluation
	Katherine Lennan, OTR	Nov 8, 2010

Current information is based upon:
File Review
Review of Report from Alta Vista Occupational Therapy Consultation

Summary of Outside Occupational Therapy Evaluation - conducted 8-18-2010 by Corey Bralower, MS OTR, for the Alta Vista Center for Autism

The Beery Buktenica Test of Visual-Motor Integration, 5th Edition
This test is comprised of three subtests: the Visual-Motor Integration portion assesses the student's ability to copy shapes of increasing difficulty with measurable accuracy; the Visual-Perceptual portion requires the student to visually determine the salient features of visual stimuli and pick out the matching stimuli that are the same when given a series of choices; and the Motor Coordination portion assesses the student's ability to control finger and hand movements while drawing within a targeted area. Student's scores are compared to same age peers. Standard Scores within the 90-109 range are considered to be in the average range. Percentile scores below 7% are considered to be very low. VMI Standard Scores correlate to standard cognitive assessments and can be used to assist in determining a child's overall level of function in visual-motor integration skills as compared to cognitive skills. Drew's scores are as follows:

Subtest	*Raw Score*	*Standard Score*	*Percentile*
Visual-Motor Coordination	*12*	*65*	*1*
Visual-Perception	*13*	*61*	*.9*
Motor Coordination	*5*	*<45*	*.02*

"When completing the VMI, Endrew demonstrated decreased postural control and increased distractability perseverating on shutting down the computer. He appeared to rush through all the subtests of the VMI, which may have contributed to his low scores"

The Wold Sentence Copying Test
"Endrew demonstrated a consistent right hand preference both on the VMI and on the Wold. He demonstrated decreased bilateral coordination not stabilizing his paper with his non-preferred hand while writing. Endrew held his pencil with four fingers, demonstrating decreased separation of his hand. While writing he was able to write with his pencil sitting in his web space which is the appropriate location for the writing utensil to sit. Endrew had to complete this test two times because he was not able to utilize the given lines on the test. When provided with 1" lines Endrew demonstrated improved legibility however, he continued to write with decreased alignment, sizing,and spacing between the words and letters affecting overall legibility. He omitted letters when copying during this assessment therefore his letters per minute score was undeterminable. One factor that greatly impacts the legibility of Endrew's writing is that he writes letters on top of already written letters, a visual spatial and motor planning deficit."

Information reported at previous IEP Meeting (4-13-2010 by Katherine Lennan, OTR
The information reported below is a summary of Drew's motor, self care and sensory processing skills as of April 13, 2010.

Assessment includes records review, OT intervention, observation in the classroom, and informal assessment.

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Legal Name of Student: [redacted], Andrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Vista Date of Meeting: 11/16/10

Present Level of Academic and Functional Performance/Achievement

Drew is a 10 year 6 month old boy who receives Occupational Therapy as part of his educational program. Within the past year, Drew has been seen 30 minutes a week both individually and in a group to focus on his sensory processing and typing skills. This is an Aanual report to update his functional levels.

Motor Checklist

Drew was informally assessed for fine and gross motor skills. He demonstrates the ability to manage classroom tools, fold paper, manage scissors, manage a hole punch and stapler. Gross motor skills include tasks requiring strength, coordination and balance such as walking on a balance beam, jumping, hopping, skipping, running, and climbing on playground equipment. Drew demonstrates adequate fine and gross motor skills to access his school environment.

Informal Handwriting/Keyboarding Assessment

A handwriting sample was obtained from classroom assignments. Drew used standard wide ruled paper for the handwriting sample. Drew was able to utilize available space on each line to place his letters and demonstrated adequate fine motor skills for letter formation, alignment, spacing, sizing and general legibility for handwriting tasks. Legibility can be variable with his attention to task. Drew demonstrates a functional grasp on writing utensils and a consistent hand dominance. He is able to access a keyboard without modifications and is now able to type at a rate of 7-9 wpm.

Activities of Daily Living (ADLs)/Self-Care

Drew demonstrates adequate self-care skills to access his school environment.

Sensory Needs

Drew demonstrates the need for excessive amounts of sensory input in order to increase his ability to function within the academic setting. Drew seems more disorganized in the spring and requires more sensory breaks and more intense sensory input. His sensory integration difficulties are demonstrated by his distractibility, constant need for fidgeting or movement, and need to touch things. Loud noises including in the cafeteria, parties, and assemblies can cause Drew distress and he may begin to wander or yell out. A variety of sensory strategies have been taught to Drew and he has demonstrated how to use these strategies effectively. Drew will often seek deep pressure, neutral warmth, and chewing to reorganize himself. Some of his preferred activities have been having a therapy ball rolled on him, wrapping himself in a sleeping bag, chewing, and "pizza".

Health Status	Evaluator	Date of Evaluation
	W. Pepper RN BSN	Nov 9, 2010

11.9.10 Health update obtained from mother, Jennifer [redacted] staff, and from files reviewed. Drew currently attends Alta Vista, a private school in Denver. Drew has been diagnosed with ADHD, autism and severe allergies to nuts (esp. cashews). Per mother, he is no longer allergic to peanuts or wheat. Current daily medications include Concerta 90 mg, Intuniv 4 mg, Lexapro 30 mg, Zyrtec 10 mg and Clonidine 0.1 mg. He takes the Concerta, Intuniv and Lexapro once a day, in the morning. He takes the Zyrtec and clonidine at bedtime. Medications/ doses are per physician and subject to change without notice. Possible adverse effects from medications include, but are not limited to, seizures, cardiac complications, tics, drowsiness, nervousness, irritability, headache, diminished appetite, and insomnia. Mother states Drew has not shown any adverse effects from meds. Regarding his tree nut allergy, Drew avoids these and has not had any recent reactions. W.Pepper RN 11.9.10

4/13/09 Annual update. Information obtained from mother, Jennifer [redacted] as well as from files reviewed. See previous report below. Drew has been diagnosed with autism, ADHD, and severe allergies to nuts and peanuts. Currently, Drew's daily medications are Concerta and Lexapro. Epi pen jr has been prescribed to be given as needed for severe allergic reactions. Mother reports that the side effects he experiences from Concerta and Lexapro include diminished appetite and sleep disruptions. (Medications are per physician and subject to

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Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Vista Date of Meeting: 11/15/10

Present Level of Academic and Functional Performance/Achievement

change without notice.) Distractibility, difficulty maintaining attention and focus and disruptive behaviors are areas of concern. Social interaction and communication issues persist. Se attached health care plans. W.Pepper RN BSN .

4/28/08 Reviewed school records, IEP reports, and the health information update form completed by Jennifer [redacted] mother. No significant medical concerns reported regarding the pregnancy or Drew's birth. Mom notes that Drew experienced some speech delays. Drew has been diagnosed with Autism (2001) and ADHD (2005). He is currently taking Lexapro, Focalin and Quanfacine daily. Mom reports that side effects Drew has experienced include some sleep disruptions. Mom also notes that Drew has some anxiety. Additionally, Drew has seasonal allergies. Drew has very good school attendance. Unable to screen for vision at school. No concerns in the classroom regarding vision. Hearing tested by district audiologist. K. Mueller RN,BSN

Results of vision screening: 9/28/09 20/20 R & L
Results of hearing screening: 9/28/09 Pass R & L
Health Care Plan?: Yes
How does it relate to the suspected disability?: N/A

Interpretation of Results:

Write a narrative statement, integrating the information above and information regarding the student's growth/progress under previous IEPs or conclusions about RtI.

Mrs. Reoh, Drew's 4th grade classroom teacher, reports that in the general education class Drew has the most success during read aloud time. Drew will eat his snack while the story is being read and will color or work a puzzle as the teacher is reading. In group activities, Drew shows initial interest but his attention is short and he needs redirection from the para-educator. His peers will try to redirect him but he only listens to the redirection from the para-educator. Drew enjoys playing math fact games with the class. He greets kids in his class and his teacher. Drew's conversations are limited to "hi" with peers and he has scripted conversations with his teacher.

Drew continues to need specialized instruction for reading, writing and math. Drew's level of anxiety with academic demands especially with new concepts continues to be high. This year he has had an increase in aggressive behaviors resulting in room clears and the use of calming down areas.

Drew exhibits significant weaknesses with social language skills, and continues to need specialized instruction for development of communication skills.

Drew demonstrates fine/gross motor and visual motor skills that are functional for the academic environment when he is able to focus his attention. He remains very distractible and requires frequent cueing to remain on task. The rapid rate at which he completes many tasks often negatively impacts his performance.

The staff from Alta Vista is in agreement with the interpretation of results.

How does the student's suspected disability impact access to and progress in the general curriculum, including content standards?

Drew's disability impacts his access to the general curriculum in all areas. He requires specialized instruction for academics and paraprofessional support to participate in the general classroom activities. Drew will be working towards modified standards in reading, writing, and math as outlined in the goals and objectives.

Drew's communication difficulties impact his ability to interact with peers and adults in an educational setting.

Drew's difficulty with sensory processing and self-regulation skills negatively impacts his ability to access his

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Present Level of Academic and Functional Performance/Achievement

educational program.

What are the student's educational needs resulting from the child's disability that are to be addressed by this IEP?
To improve reading, writing, and math skills
To strengthen daily living skills
To improve social language skills
To improve self-regulation

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Douglas County School District Re 1 - Special Education Department
620 Wilcox St., Castle Rock, CO 80104
(303) 387-0080

DRAFT

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Vista Date of Meeting: 11/16/10

Determination of Eligibility and Disability

(This section completed only for eligibility meetings)

Have sufficient and appropriate evaluations been completed, documented, and considered to determine the child's/student's current level of functioning, achievement, performance and educational needs? ☐ Yes ☐ No

If not, obtain additional information and reconvene the meeting.

(This section completed only for eligibility meetings)

☐ is ☐ is not *due to a lack of appropriate instruction in reading, including the essential components of reading instruction.*

☐ is ☐ is not *due to a lack of appropriate instruction in math.*

☐ is ☐ is not *due to limited English proficiency.*

(This section completed only for eligibility meetings.)

If no, does the child/student have a disability as defined in the State Rules for the Administration of the Exceptional Children's Educational Act? ☐ Yes ☐ No

If no, terminate the meeting.

If the student has a disability, the disability is
(if more than one disability is determined, the primary disability should be identified with a 1, the secondary disability with a 2.

- ☐ Significant Limited Intellectual Capacity
- ☐ Significant Identifiable Emotional Disability
- ☐ Specific Learning Disability
- ☐ Hearing Disability *(requires communication plan)*
- ☐ Vision Disability *(requires literacy plan)*
- ☐ Speech or Language Impairment
- ☐ Preschool Child with a Disability

Physical Disability

- ☐ Traumatic Brain Injury
- [1] Autism
- ☐ Other Physical Disability
  - ☐ Check if physical disability due to ADD/ADHD.

Multiple Disabilities

- ☐ Deaf-Blind
- ☐ Multiple Disabilities with Cognitive Impairment

Complete the appropriate checklist for determination of each disability selected.

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INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Vista Date of Meeting: 11/16/10

Academic/Functional Goals and Objectives

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the same extent as nondisabled children.

Annual Goal: *1. The student will demonstrate the ability to read and comprehend a variety of instructional-leveled texts, as measured by the following objectives:*

Standard/ Access Skill: *Language Arts, 4*

Short-term Objective: *a) Drew will read non-fiction texts at his instructional reading level and answer teacher directed questions from his reading.* Start: 11/16/10 End: 04/29/11

Checkpoint: *4 - 6 (4.2): Uses a variety of strategies (e.g., asking questions, drawing conclusions, using clues from text to support generalizations, distinguishing between fact/opinion and cause/effect) to comprehend narrative and expository text.*

Criteria: *>= 80 percent in 3 out of 4 consecutive trials with <= 2 verbal prompts in 1 environment(s)*

Narrative: *Non fiction texts will be provided at Drew's instructional level.*

Baseline: *<= 50 percent with >= 5 verbal prompts*

Narrative: *Drew is able to read non-fiction texts at a 2.5 grade level. He requires prompting to answer comprehension questions. Basic Reading 2.9 G.E. on WJII (per Alta Vista). As of 11/12/2010, Drew is able to answer What questions related to information at a 1st grade level with 48% with no prompting.*

Methods(s) of Measurement: *Written performance, Oral performance, Data collection.*

Short-term Objective: *b) Given a set of directions or steps, Drew will read and follow the directions or steps.* Start: 11/16/10 End: 04/29/11

Checkpoint: *4 - 6 (4.2): Uses a variety of strategies (e.g., asking questions, drawing conclusions, using clues from text to support generalizations, distinguishing between fact/opinion and cause/effect) to comprehend narrative and expository text.*

Criteria: *>= 80 percent in 3 out of 4 consecutive trials with <= 2 verbal prompts in multiple environment(s)*

Narrative: *Drew will attend to written directions/steps, and execute the task(s) with at least 80%*

Progress Key:
1. Skill / behavior is rarely or never demonstrated, therefore incomplete positive data is available.
2. Skill / behavior is inconsistent with frequent prompts and is below expectations of plan.
3. Skill / behavior is consistent over time with few prompts and meets expectations of plan.
4. Skill / behavior is generalized and transferred without prompts and is above expectations of plan.

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Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Viste Date of Meeting: 11/16/10

Academic/Functional Goals and Objectives (con't)

accuracy, when given two or fewer verbal prompts.

Baseline: <= 50 percent with >= 3 verbal prompts

Narrative: Drew requires multiple prompts to read and follow directions.

Methods(s) of Measurement: Demonstration/Performance, Data collection.

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Legal Name of Student: [redacted] Andrew Robert LASID: 122955 SASID: 5914080767
School of Attendance: Alta Vista Date of Meeting: 11/16/10

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the same extent as nondisabled children.

Annual Goal: *2. The student will improve writing skills as measured by the following objectives:*

Standard/ Access Skill: *Language Arts, 3*

Short-term Objective: *a) Drew will use non-fiction text vocabulary at his instructional reading level to give written responses to questions.* Start: 11/16/10 End: 04/29/11

Checkpoint: *4 - 6 (3.3): (Conventions) Produces a legible product using conventions for writing such as punctuation, capitalization, standard spelling, and grammar.*

Criteria: *>= 80 percent in 3 out of 4 consecutive trials*

Narrative: *Drew will be able to correctly use new vocabulary 80% of the time.*

Baseline: *<= 50 percent*

Narrative: *Drew uses new vocabulary in responses to questions less than half of the time. At Alta Vista, Drew has demonstrated 95% accuracy on a 1st-2nd grade level as of 7/23/10 based upon baseline data taken on his incoming objectives.*

Methods(s) of Measurement: *Written performance, Data collection.*

Short-term Objective: *b) Drew will use appropriate conventions (capitals, punctuation) to keyboard and/or communicate via e-mail.* Start: 11/16/10 End: 04/29/11

Checkpoint: *4 - 6 (3.3): (Conventions) Produces a legible product using conventions for writing such as punctuation, capitalization, standard spelling, and grammar.*

Criteria: *>= 80 percent in 3 out of 4 consecutive trials in multiple environment(s)*

Narrative: *Drew will type a 5 sentence e-mail that includes at least 2 questions, using appropriate capitalization and ending punctuation, with support.*

Baseline: *<= 10 percent*

Narrative: *Drew has not yet used e-mail as a regular formof communication. At Alta Vista Drew currently writes a 2-3 sentence email independently.*

Methods(s) of Measurement: *Written performance, Data collection.*

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School of Attendance: Alta Vista Date of Meeting: 11/16/10

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the same extent as nondisabled children.

Annual Goal: *3. The student will communicate an understanding of number sense as measured by the following objectives:*

Standard/ Access Skill: *Mathematics, 1*

Short-term Objective: *a) Given a variety of coins and dollars, Drew will accurately count money up to $5.00 and then hand over the correct amount counted.* Start: 11/16/10 End: 04/29/11

Checkpoint: *4 - 6 (1.1): Understands value as it relates to positive rational numbers (e.g., 3/4, 1/3, 2/1, 0.75), including terminating decimals through hundredths, commonly-used fractions (i.e., halves, thirds, fourths, fifths, eighths, tenths), mixed numbers, and percents.*

Criteria: *>= 90 percent in 3 out of 4 consecutive trials in 2 environment(s)*

Narrative: *When presented with a handful of money and a certain amount to provide, Drew will accurately count the coins/dollers representing the given amount.*

Baseline: *<= 80 percent in 3 out of 4 consecutive trials with >= 3 verbal prompts*

Narrative: *Drew can count money with a variety of coins but is inconsistent. At Alta Vista Drew has mastered counting the value of like coins & mixed coins involving pennies, nickels & dimes; currently at 47% with quarters & dimes*

Methods(s) of Measurement: *Oral performance, Demonstration/Performance, Data collection.*

Short-term Objective: *b) When identifying an object Drew wishes to purchase, he will be able to answer the question, "is that enough money?".* Start: 11/16/10 End: 04/29/11

Checkpoint: *4 - 6 (1.5): Uses oral/written language to communicate an understanding of number sense.*

Criteria: *>= 90 percent in 4 out of 4 consecutive trials*

Narrative: *In a simulated store situation where Drew is supplied with X amount of money, he will be able to indicate if he has enough money to purchase a desired item.*

Baseline: *<= 50 percent with >= 3 verbal prompts*

Narrative: *Drew does not consistently demonstrate understanding of the concepts of greater than/less than, along with the ability to answer yes/no accurately.*

Methods(s) of Measurement: *Demonstration/Performance, Data collection.*

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Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Vista Date of Meeting: 11/16/10

Academic/Functional Goals and Objectives (con't)

Short-term Objective: c) Given a word problem, Drew will be able to identify which operation (addition, subtraction, multiplication or division) to use to solve the problem
Start: 11/16/10 End: 04/29/11

Checkpoint: 4 - 6 (1.5): Uses oral/written language to communicate an understanding of number sense.*

Criteria: >= 90 percent in 4 out of 4 consecutive trials in 2 environment(s)

Narrative: Drew chooses the correct operation needed to solve a 1 step word problem

Baseline: <= 75 percent in 3 out of 4 consecutive trials with >= 3 verbal prompts

Narrative: Drew is able to distinguish between 1 step word problems involving addition and subtraction.

Methods(s) of Measurement: Written performance, Oral performance, Demonstration/Performance, Data collection.

Short-term Objective: d) Drew will learn his multiplication facts 6-12.
Start: 11/16/10 End: 04/29/11

Checkpoint: 4 - 6 (1.3): Understands basic mathematical properties (e.g., 2 + [3 + 4] = [2 + 3] + 4, 12 ÷ 2 ' 2 ÷ 12) and how they apply to whole and rational numbers.

Criteria: >= 90 percent in 3 out of 4 consecutive trials

Narrative: Drew will use paper/pencil and/or math facts game opportunities to demonstrate automatic recall of multiplication facts involving digits 6-10.

Baseline: <= 80 percent, over the course of 3 day(s)

Narrative: Mastered 0-5 on paper/pencil tasks. Updated baseline data provided by Alta Vista: as of 11/12/10 has mastered 5, 6, 7, & 8 x 0-12 w/oral fluency & worksheets

Methods(s) of Measurement: Demonstration/Performance, Data collection.

Short-term Objective: e) Drew will learn his division facts 0-5.
Start: 11/16/10 End: 04/29/11

Checkpoint: 4 - 6 (1.3): Understands basic mathematical properties (e.g., 2 + [3 + 4] = [2 + 3] + 4, 12 ÷ 2 ' 2 ÷ 12) and how they apply to whole and rational numbers.

Criteria: >= 90 percent in 3 out of 4 consecutive trials

Narrative: Drew will use paper/pencil or math facts game opportunities to demonstrate automatic recall of division facts involving digits 0-5.

Baseline: <= 50 percent

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School of Attendance: Alta Vista Date of Meeting: 11/16/10

Academic/Functional Goals and Objectives (con't)

Narrative: *Drew knows division facts for 0 and 1 on paper/pencil tasks.*

Methods(s) of Measurement: *Written performance, Data collection.*

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School of Attendance: Alta Vista Date of Meeting: 11/16/10

Academic/Functional Goals and Objectives (con't)

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Annual Goal: *4. The student will improve social communication skills in order to access the general education curriculumas measured by the following objectives:*

Standard/ Access Skill: *Communication and Basic Language Skills*

Short-term Objective: *a) Given a structured small group setting, Drew will engage in appropriate turn taking skills by attending to a peer's turn and waiting for his own turn.* Start: 11/16/10 End: 04/29/11

Checkpoint:

Criteria: *"4/5 opportunities" with <= 1 verbal prompts*

Narrative: *Drew will watch the peer while he/she takes a turn & wait to begin his own turn until the previous turn has been completed.*

Baseline: *"1/5" with >= 3 verbal prompts*

Narrative: *Drew typically does not wait for others' to finish their turns; his attention is usually focused on his own turn rather than watching others.*

Methods(s) of Measurement: *Demonstration/Performance, data collection.*

Short-term Objective: *b) Given a structured small group setting, Drew will demonstrate 2 appropriate verbalizations, following a model/prompt, during game play (simple board game, bingo, racing matchbox cars, etc) with at least one peer.* Start: 11/16/10 End: 04/29/11

Checkpoint:

Criteria: *>= 2 occurrences with <= 1 verbal prompts*

Narrative: *When Drew engages in structured play with a peer, he will make at least two appropriate comments or questions directed at the peer and that are related to the situation.*

Baseline: *<= 0 occurrences with >= 5 verbal prompts*

Narrative: *Drew does verbalize during game play; however, his comments are often unrelated to the activity and are not directed at other people.*

Methods(s) of Measurement: *Oral performance, data collection.*

Short-term Objective: *c) Given a structured small group situation, Drew will answer open ended questions with a topic related one or two word reply, demonstrating 2 out of 3 successes per opportunity.* Start: 11/16/10 End: 04/29/11

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School of Attendance: Alta Vista Date of Meeting: 11/16/10

Academic/Functional Goals and Objectives (con't)

Checkpoint:
Criteria: *"successful 2/3 times per opportunity"*

Narrative: *Drew will provide an appropriate 1-2 word response when asked direct open ended questions.*

Baseline: *"1/3 successes"*

Narrative: *Drew will answer questions, but his remarks are frequently unrelated to the context.*

Methods(s) of Measurement: *Oral performance, data collection.*

Short-term Objective: *d) Given a structured small group setting, Drew will respond to a statement with a question, demonstrating 2 out of 3 successes per opportunity.* Start: 11/16/10 End: 04/29/11

Checkpoint:
Criteria: *"2 out of 3 successes per opportunity"*

Narrative: *Using role playing in a practice conversation setting & minimum level of prompting (ex. one word prompt or visual cue to signal ask a question)*

Baseline: *<= 1 success*

Narrative: *maximum level of prompting (ex. Clinician: "I had a fun weekend." "Drew, say: 'What did you do?'"*

Methods(s) of Measurement: *Oral performance, data collection.*

Short-term Objective: *e) Drew will advocate for himself while engaged in non-preferred activities in the school environment by making a variety of simple purposeful requests to indicate his needs in regards to regulating his behavior/emotions and making requests for items needed to complete tasks.* Start: 11/16/10 End: 04/29/11

Checkpoint:
Criteria: *"4 out of 5 opportunities"*

Narrative: *Drew will verbalize simple sentences (ex. I want _____. I need _____.) in response to a verbal or gestural cue, to indicate his needs.*

Baseline: *"baseline data to be determined"*

Narrative: *Drew typically indicated his needs through behaviors or gestures rather than verbal communication. Reported by Alta Vista, as of 11/12/10 Drew is able to verbally request an average of 24 different items per day with an average rate of 13 requests per half*

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Legal Name of Student: [redacted] *Endrew Robert* LASID: *122955* SASID: *6914080767*
School of Attendance: *Alta Vista* Date of Meeting: *11/16/10*

Academic/Functional Goals and Objectives (con't)

hour, independently. Requests included, "Help me with...", "I need..."

Methods(s) of Measurement: *Oral performance, data collection.*

DRAFT

Legal Name of Student: [redacted] Andrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Vista Date of Meeting: 11/16/10

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the same extent as nondisabled children.

Annual Goal: *5. The student will improve his sensory motor skills to increase attention and focus for academics as measured by the following objectives:*

Standard/ Access Skill: *Physical*

Short-term Objective: *a) To demonstrate improved sensory motor skills and to provide an opportunity for independent sensory input, Drew will utilize the playground swings.*

Start: *11/16/10*
End: *04/29/11*

Checkpoint:

Criteria: *"3) Performs activity with verbal/gestural cues" in 3 out of 4 consecutive trials*

Narrative: *Drew will climb onto the swing, begin to pump and maintain a swinging motion when given verbal or gestural cues.*

Baseline: *"2) Participates with partial physical assistance"*

Narrative: *Drew can climb onto the swing but is unable to pump to begin and maintain a swinging motion. At Alta Vista, Drew is able to pump while swinging. He is also able to swing independently at home.*

Methods(s) of Measurement: *Demonstration/Performance.*

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School of Attendance: Alta Vista Date of Meeting: 11/16/10

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the same extent as nondisabled children.

Annual Goal: *6. The student will learn and utilize strategies to improve social interactions with adults and peers as measured by the following objectives:*

Standard/ Access Skill: *Inter- / Intrapersonal*

Short-term Objective: *a) Drew will learn and utilize how to identify his internal states by seeking adult support when needed and accurately answering yes/no questions regarding his emotional state.* Start: 11/16/10 End: 04/29/11

Checkpoint:

Criteria: *"2/3 successes per opportunity" with <= 2 verbal prompts in 2 environment(s)*

Narrative: *Through the use of a self regulation educational program, a 5-point scale, role playing, and incidental teaching opportunities.*

Baseline: *"0/3 successes per opportunity" with >= 3 verbal prompts*

Narrative: *Drew expresses his internal states through behavior rather than verbal expression. Alta Vista reports that Drew is working on referencing an adult when upset (10/8/10) He currently references adults 33% of the time when upset.*

Methods(s) of Measurement: *Oral performance, Demonstration/Performance.*

Short-term Objective: *b) Develop joint attention abilities for social-communication interactions across partners and contexts by attending to people over objects during a shared activity.* Start: 11/16/10 End: 04/29/11

Checkpoint:

Criteria: *"2/3 successes per opportunity" with <= 2 verbal prompts in 2 environment(s)*

Narrative: *Through shared anticipation activities and incidental teaching opportunities.*

Baseline: *"0/3 successes per opportunity" with >= 3 verbal prompts in 2 environment(s)*

Narrative: *Drew attends to objects more than people. Alta Vista reports that Drew currently engages in 4 play routines - acting out Finding Nemo, Mario Kart track building, etc.*

Methods(s) of Measurement: *Demonstration/Performance.*

Short-term Objective: *c) Drew will demonstrate socially appropriate eating habits in the school environment.* Start: 11/16/10 End: 04/29/11

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Legal Name of Student: [redacted] Andrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Vista Date of Meeting: 11/16/10

Academic/Functional Goals and Objectives (con't)

Checkpoint:

Criteria: *"3) Performs activity with verbal/gestural cues" in 4 out of 5 consecutive trials in 1 environment(s)*

Narrative: *Closing his mouth while chewing, taking small bites, and will clean his face and hands with a napkin.*

Baseline: *"baseline data to be determined"*

Narrative: *eats with mouth open, takes large bites of food; Currently, at Alta Vista, when given nickel size bites of sandwich with single bite presentation, Drew has an average of 80% accuracy swallowing prior to reaching for another bite.*

Methods(s) of Measurement: *Demonstration/Performance.*

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Legal Name of Student: [redacted] Andrew Robert LASID: 122955 SASID: 6914080767

School of Attendance: Alta Vista Date of Meeting: 11/16/10

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the same extent as nondisabled children.

Annual Goal: *7. The student will increase independence in an educational setting in order to demonstrate decreased anxiety as measured by the following objectives:*

Standard/ Access Skill: *Organization*

Short-term Objective: *a) Given a systematic work system with 3 familiar academic tasks (2 preferred and 1 non-preferred) Drew will maintain his independence to completion of assigned tasks.*

Start: 11/16/10
End: 04/29/11

Checkpoint:

Criteria: *>= 2 successes in 2 out of 4 consecutive trials*

Narrative: *Drew will complete 2 preferred and 1 non-preferred task independently.*

Baseline: *"baseline to be determined"*

Narrative: *Drew is able to complete 3 preferred tasks independently. Currently, at Alta Vista, Drew has a leisure schedule with 4 preferred activities on it, that he is able to complete independently. Drew follows a PE schedule with 3-4 non-preferred activities before he is able to engage in his preferred activity (digging in rocks).*

Methods(s) of Measurement: *Demonstration/Performance.*

DRAFT

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Vista Date of Meeting: 11/16/10

Academic/Functional Goals and Objectives (con't)

With the exception of the initial IEP, the committee must review and document progress toward completion of the student's previous goals and objectives prior to the development of new goals and objectives. Based upon this document, parent(s) will be regularly informed of progress to the same extent as nondisabled children.

Annual Goal: 9. The student will as measured by the following objectives:
Standard/ Access Skill: not aligned

Short-term Objective:	Start: End:
Checkpoint:	
Criteria:	
Narrative:	
Baseline:	
Narrative:	
Methods(s) of Measurement:	

Short-term Objective:	Start: End:
Checkpoint:	
Criteria:	
Narrative:	
Baseline:	
Narrative:	
Methods(s) of Measurement:	

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DRAFT

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Vista Date of Meeting: 11/16/10

Special Education, Related Services & Supplementary Aids/Services

Accommodations / Modifications:

Describe the unique accommodations/modifications necessary for the student to participate in the general education curriculum, as well as, nonacademic and extra curricular activities considering the identified needs of the student.

Systematic instructional techniques, such as scaffolding, breaking down tasks to smaller tasks, pre-teaching social skills in a one to one setting, and/or role playing.
Visual and/or written schedules as needed
Movement and sensory breaks as needed
Use of social stories for unexpected transitions and adult assisted emotional regulation
Use of social movies to reinforce positive learning behaviors
Opportunities to generalize social and communication skills in a variety of school settings.
Use of reinforcement schedules to assist in learning non-preferred tasks
Provide access to quieter, less distracting work spaces as needed
Provide access to restrooms

Service Delivery:

Specific services needed to address goals and objectives:

Regular Education Classroom with support from the Significant Support Needs Program 15 hours per week integrated in the general classroom and 17.5 hours per week direct instruction outside of the general education classroom. Direct adult supervision, provided by an SSN teacher and/or para-educator would be gradually faded as Drew's needs allow. Monitoring at all times for safety.

Occupational therapy to be provided outside of the general education classroom 30 minutes per week in an individual setting.

Speech/Language intervention to be provided one hour per week, outside of the general education classroom in a combination of individual and small group settings.

Mental health support to be provided one hour per week, outside of the general education classroom, in a combination of individual and small group settings.

Fifteen minutes per week for multi-disciplinary team consultation.

Special Education Services:

	Service Coordinator				
Type of service provider (assignment)	SSN/EA	OT/COTA	SLP/SLPA/E	MH	
Projected beginning date of service	11/16/10	11/16/10	11/16/10	11/16/10	
Projected ending date of service	04/29/11	04/29/11	04/29/11	04/29/11	
	Hours of Special Education Services per Week by Service Provider				
Indirect (consultation)	0.25	0.25	0.25	0.25	
Integrated services in general classroom	15				
Direct outside general classroom	17.5	0.5	1	1	
Total hours by provider	32.75	0.75	1.25	1.25	

Note: Additional information may be provided on Comments page

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Legal Name of Student: [redacted], Andrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Vista Date of Meeting: 11/16/10

Special Education, Related Services & Supplementary Aids/Services

continued...

Other IEP Services:
(such as supplementary aids and services)

	Description	Start/End Dates
Parent Follow-up Activities		
Preschool Integrated Education Program		

Does the student require:

Special transportation?	☒ Yes	☐ No
A literacy/modality plan? (For Vision Disability)	☐ Yes	☒ No
A communication plan? (For Hearing Disability)	☐ Yes	☒ No
A behavior plan?	☒ Yes	☐ No
A health care plan?	☒ Yes	☐ No
Assistive technology? (If yes, describe):	☐ Yes	☒ No

Extended School Year? ☒ Yes ☐ No ☐ To be determined by: _____
(Rationale for decision)

While there has been no opportunity to gather regression/recoupment data in the past 6 months, we would anticipate that based on Drew's diagnosis of Autism he would meet the eligibility criteria for Extended School Year services.

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DRAFT

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Legal Name of Student: [redacted], Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Vista Date of Meeting: 11/16/10

Special Education, Related Services & Supplementary Aides/Services

Recommended Placement in Least Restrictive Environment (LRE):

How much time is student only with students with disabilities? 55-60%

Setting Code: 303 Inside the Regular Class Less than 40% of the Time

Why? This setting best meets his needs & allows himto receive maximum benefit in the LRE.

Involvement of Student in State and District Assessments:

(a) What state and district assessments of student achievement will the student be taking?

☐ CSAP ☒ CSAP-A ☐ Other: _____

(b) What accommodations, if any, will be provided to the student related to the administration of the assessments of student achievement? Accommodations must be a regular part of student's IEP.

All accommodations in this IEP and allowed by the assessment tool. May include, one on one instruction, simplify verbal directions as allowed per test design, written directions/picture cues as allowed

(c) If the student will not participate in said assessments, why not?

(d) How will the student be assessed?

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DRAFT

Legal Name of Child/Student: [redacted] *Endrew Robert* Date of Meeting: *11/16/10*
Birthdate: [redacted] C.A.: [redacted] LASID: *122955* SASID: *6914080767*

Determination of Disability

DEFINITION: A child with a physical disability shall have a sustained *illness or disabling physical condition* which prevents the child from receiving reasonable educational benefit from general education.

A sustained illness means a prolonged, abnormal condition requiring continued monitoring characterized by limited strength, vitality, or alertness due to chronic or acute health problems and a disabling condition means a severe physical impairment. Conditions such as, but not limited to, traumatic brain injury, autism, attention deficit disorder and cerebral palsy may qualify as a physical disability, if they prevent a child from receiving reasonable educational benefit from general education.

Criteria for a physical disability preventing the child from receiving reasonable educational benefit from general education should be dependent upon the child's diagnosis and degree of involvement in the regular school setting as characterized by any of the following:

The child's chronic health problem or sustained illness requires *(check those that apply)*

- ☐ continual monitoring,
- ☐ intervention, and/or
- ☐ specialized programming

In order to accommodate the effects of the illness so as to reasonably benefit from the educational program.

The child's physical disability interferes with: *(check those that apply)*

- ☐ ambulation,
- ☒ attention,
- ☐ hand movements,
- ☒ coordination,
- ☒ communication,
- ☒ *self-help skills, and*
- ☒ other activities of daily living

to such a degree that it requires: *(check those that apply)*

- ☒ special services,
- ☐ *equipment, and/or*
- ☐ transportation.

REQUIRED FOR DETERMINATION OF A PHYSICAL DISABILITY.

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Form F.8

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Legal Name of Child/Student: [redacted] *Endrew Robert* Date of Meeting: *11/16/10*
Birthdate: [redacted] C.A.: [redacted] LASID: *122955* SASID: *6914080767*

INDIVIDUAL LITERACY PLAN / COLORADO BASIC LITERACY ACT SUGGESTED PARENT/FAMILY INTERVENTIONS

The following suggested checklist of parent/family literacy interventions are not required by Special Education law, but are based upon Colorado Basic Literacy Act (CBLA) requirements:

Elementary School Level

Primary Level: Parent privides support outside the school day.

- ☐ Read to the child each day.
- ☐ Read with the child each day.
- ☐ Talk with the child about what they are reading and/or watching.
- ☐ Encourage child to use reading for a variety of reasons (recipes, lists, etc.).
- ☐ Write for a variety of reasons (cards, letters, journals, etc.).
- ☐ Practice alphabet letter identification and letter sounds with the child.
- ☐ Practice reading high frequency word cards with the child.
- ☐ Monitor the child's homework.
- ☐ Other:

Intermediate Level: Parent provides support outside the school day.

- ☒ Read to the child each day.
- ☒ Read with the child each day.
- ☒ Talk with the child about what they are reading and/or watching.
- ☒ Encourage child to use reading for a variety of reasons: recipes, newspapers, magazines, lists, letters, etc.)
- ☒ Monitor the child's homework.
- ☒ Attend parent/teacher conferences.
- ☐ Provide additional support in the following ways:

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SPECIAL EDUCATION TRANSPORTATION FORM

11/16/10	11/16/10	122955	6914080767
Meeting Date	Expected Starting Date	LASID	SASID

The following information must be provided with IEPs of students requiring special transportation as a related service.

Name of Student: [redacted] Endrew Robert DOB: [redacted] Grade: 5 Track Mod.

INFORMATION SOURCE

Case Mgr.
School Year: 2010-2011 Program: SSN Home School: SVE
Home/Address: [redacted]
School of Attendance: SVE Parent/Guardian Name: [redacted] Joe
Telephone: Home: [redacted] Mother(w): Father(w):

Case Mgr./ Transport./ Parent
A.M. Pickup Location: Phone:
P.M. Dropoff Location: Phone:

Case Mgr./ Parent
EMERGENCY CONTACT: Name:
Phone:

Case Mgr./ Parent/ Nurse
EMERGENCY MEDICAL INFORMATION:
Student's Doctor: Phone:
Hospital Preference: Address:
Allergies:
Current Medication: Dosage:
Special Instructions for Attending Physician:

Case Mgr./ Parent/ Nurse
IMPORTANT MEDICAL INFORMATION FOR SAFE TRANSPORTATION OF STUDENT
(include any special training needed by bus personnel, para support, etc.):

Photo Here (provided by transportation department)

Case Mgr.
SPECIAL INSTRUCTIONS FOR DEALING WITH STUDENT
(language, medical information, behavior, etc.):

SPECIAL BUS NEEDS (check all that apply): ☐ Wheelchair ☐ Postural Support
☐ Walker ☐ Carseat ☐ ParaPro Other:

Case Mgr.
OTHER TRANSPORTATION ARRANGEMENTS (describe):

Case Manager (print): Amy Holton Phone: 303-387-6800

Case Manager Signature:

1 COPY WITH THE IEP, 1 COPY TO TRANSPORTATION

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DRAF

Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080787
School of Attendance: Alta Vista Implementation Date: Draft

Behavior Intervention Plan

Contributors to Plan:

Amy Holton, SSN Teacher; Robin Kessel, Speech and Language Therapist; Monica Ritzdorf, COTA ,Kathy Lennan, Occupational Therapist; Nicole Breuer, Social Worker

Background Information:

Drew has a diagnosis of Autism with ADHD; he is currently taking the following medications to regulate his behavior: Lexapro 20mg, Concerta extended release 54mg and 36 mg (equals 90 mg), and Intuniv 4mg. Per Mrs. [redacted] report, all medications are given in the morning just before coming to school. The addition of the Intuniv medication began in February of 2010. The Concerta has been increased over time since the third grade. Drew has been served in the general education and SSN classrooms for the 2009/2010 school year. He has made growth in many domains. For example, Drew is able to express some simple emotions (happy, mad) and he is able to take turns playing a game with others. Drew is also beginning to look towards the person talking and he is responding with a one word greeting. According to the SSN teacher, when Drew is supported by a para in his general education classroom he can become dependent on the para that is with him. There have been efforts to aid Drew in recognizing his general education teacher as the lead adult to reference when in his classroom Drew continues to first reference his para prior to his general education teacher. Drew is able to use a limited variety of language skills. He is able to answer simple, direct questions with simple direct answers. He has made some growth ,with prompting, to ask a question of a peer based on a specific topic of information. Drew also uses language that he echoes from computer games, television, and movies. This can be spontaneous language and may or may not be related to the subject at hand. When Drew becomes frustrated in the school environment, he has a tendency to display behaviors that are disruptive to his and others learning environments. This plan was drafted after Stacey Struessel, behavior specialist received consent from Mrs. [redacted] to be involved. The outcome for this plan was to address the behaviors exhibited by Drew when he appears agitated and /or anxious in the educational environment. At this point, there has not been an opportunity to implement this plan as Drew was withdrawn from Douglas County School District on May 7th, 2010.

Strengths:

Funny
Apologizes
Sweet disposition
Reading skills
Follows routines
Able to identify tasks/objects that he wants to earn
Shows concerns for friends in SSN

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Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Vista Implementation Date: Draft

Behavior Intervention Plan

Concerning Behaviors:	Frequency:	Duration:
Climbing furniture	During episode of bx.	Less than 1 min.
Scripted falling off furniture (chair when seated, walking up the ramp, then says "oh, baby.")	During episode of bx-to daily.	Less than 1 min.
Hitting computer/TV screens	Repetitive once starts.	Less than 1 min./ every 30 s. to 1 min.
These behaviors occur when Drew begins an episode of bx//beginning at 8:40-10am or 10:30		
Seeks punishment by: (asking others to spank him, including mom)	Either onset or during a bx. episode.	Less than 1 min.
Yelling/screaming (I hate you)	Multiple x /wk.	Intermittent throughout an episode.
Scripted dumping behavior	During bx episodes.	
Kicking people Kicking walls	Two times per episode. Multiple x within an episode	1-3 times a week until he completes his script. Less than 1 min.
Head banging	Multiple x within an episode.	1-3 min.

Function/Motivation for Behavior:

Drew is a student who appears to be displaying behavior due to avoidance of expectations in the school environment that he perceives as difficult regardless of the subject area. It seems Drew may not fully understand the "purpose" behind the assignments asked of him. The team is questioning sensory processing difficulties as a function for behavior due to Drew appearing to look agitated/"crawling out of his skin" at times. This is evidenced by "Drew laying on the floor, picking at his shoes, pulling at his clothes, being in constant movement." Finally, the team is also questioning communication as a function for behavior, due to Drew's limited ability to express his needs or wants.

Target Behavior 1:	Criteria:	Criteria Narrative:
Using taught coping strategies (5 point scale, math worksheets, sensory breaks, etc) to reduce escalation of behavior episodes and remain in anxiety phase; in order to move fromanxiety phase to tension reduction.	"3) Performs activity with verbal/gestural cues" in a time period of <= 15 min(s) in 2 environment(s)	Drew will use learned strategies in order to keep fromescalating when upset.

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Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Vista Implementation Date: Draft

Behavior Intervention Plan

Target Behavior 2:
Drew will request basic wants and needs when calmby using verbal or gestural cues.

Criteria:
"3) Performs activity with verbal/gestural cues" in a time period of <= 10 min(s) in 2 environment(s)

Criteria Narrative:
Drew will be able to state e want or need when asked.

Environmental / Preventative Strategies:

What:	Staff Responsible:
Consistent/structured morning routine	SSN staff
Quiet introduction to school (soft lighting, soft music, SSN room)	SSN & Support staff
Sensory breaks at home	Parents
Front loaded sensory breaks at school	OT/SSN & support staff
3 smiley faces/checks/dollars/stars:earns reward (visual schedule)	All staff
Written directions to reduce auditory	All staff
Positive verbal reinforcement	All staff
Clear directions - no more than one step at a time	All staff
Reduce expectations of Drew until 10am	All staff
Re-enforce Drew is "safe" at school	SSN staff
Social stories	All staff
Access to visual 5 point scale for reference	MH/SSN staff

Direct Teaching of Needed Skills:

What:	Staff Responsible:
Joint attention and anticipation of opportunities with people	MH/ SSN staff
Provide script (& pre-teach) for what to do when upset	MH/SSN staff
Identification of emotional states (Alert or 5 -point scale)	MH/OT
Prompting Drew to ask for assistance when needed for basic needs/wants	All staff

Teachable Moments / Responses to Behaviors:

When Student Does This:	Staff Will Do This:
Shows anxiety by:	**Be supportive by:**
Ignores adult directions	Engage Drew in conversation, allow for sensory break & allow him choice of sensory task.
Does not say "Hi"	Set up situation for him to be successful.
Eyes dart	Ask him, "What do you want to learn today?"
Body becomes rigid, racing heart	Alter environment: soft lights and music.
Unresponsive and runs own agenda	Decrease expectations until resolved.
Does not follow routine/exhibits refusal behaviors	
Enters classroom and goes everywhere but desk	

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Legal Name of Student: [redacted] Endrew Robert LASID: 122955 SASID: 6914080767
School of Attendance: Alta Vista Implementation Date: Draft

Behavior Intervention Plan

Shows defensiveness by:
Goes under desk
Screams/Yells
Eyes look around room
Increased scripting, shouts "Wait"
No communication of any needs
Scripted/pattered behaviors (dumping, climbing, falling down)
Self Injurious behaviors (head banging/kicking)

Enters Tension Reduction:
Laying on bean bag
Apologizes to adult
Exhausted self

Be directive by:
Use white boards to communicate
Clear room, or get Drew to safe area
Allow Drew to run through his scripted behavior
Attempt to figure out what is important to him at moment and what he needs- offer it.
Use Drew's vocabulary, help learn he can earn it and then redirect him by, "What do you want to earn, make a good choice, earn 3 happy faces (obtained within 15 minutes) and you can do _____."

Create Therapeutic Rapport by:
Find way to re-engage him in school or play.

Other Information / Actions To Be Taken:
Follow up questions for parents/ongoing assessment:
Anxiety vs. medication side effects?
Avoidance vs. anxious behaviors?
What triggers lead to avoidance or anxious behavior?
What is the tie between morning routine and medication side effects & transition to school?
What is a "typical" routine at home in the morning?
What opportunities has Drew had to practice social interactions outside of the school environment?

Implementation Date: Draft Follow-up Meeting: _____

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Endrew [redacted]
Legal Name of Student

State Student ID (SASID)

[redacted]
Date of Birth

11/16/2010
Date

Local Student ID (LASID)

Administrative Unit Name

AU Address

AU Phone Number

SECTION 1: TYPE OF MEETING

Eligibility	Individualized Education Program
☐ Initial Eligibility Meeting	☐ Initial IEP
☒ 3-Year Reevaluation	☐ Annual Review
☐ Special Evaluation	☐ Amendment to IEP Dated: _____
	☒ Other: Triennial
	☐ N/A (Student Did not qualify)
Date Initial Consent for Services: _____	

SECTION 2: DATES OF MEETINGS

Date of next eligibility meeting *(on or before)* 11/16/2013 Date

Date of next IEP review meeting *(on or before)* 11/16/2011 Date

Date of initial consent for evaluation _____ Date

Date initial evaluation completed _____ Date

Date of initial eligibility determination 9/25/2002 Date

Post secondary goals due during the year when the student is 15 but no later than the end of 9th grade Date

SECTION 3: STUDENT AND FAMILY INFORMATION

	Prior to Meeting	After Meeting
District of Residence	Douglas County School District	Douglas County School District
Home School	Summit View Elementary	Summit View Elementary
School of Attendance	Alta Vista Center for Autism	Alta Vista Center for Autism
Unit/Facility of Attendance (if out of district)		
Primary Disability, if any	Autism	Autism
Primary Educational Environment	Separate School	Separate School

Grade: 5 Age: 10 Gender: ☒ Male ☐ Female

Race/ Ethnicity: ☐ American Indian or Alaskan Native ☐ Asian/Pacific Islander ☐ Black ☐ Hispanic ☒ White not Hispanic

Primary Language Spoken in the Home English _____

Student's Primary Language English _____

Does the student have Limited English Proficiency ☐ Yes ☒ No

Is an interpreter needed for meetings? ☐ Yes ☒ No

Is there an Educational Surrogate Parent (ESP)? Yes ☐ No ☒

Student's Parent/ Guardian(s)/ESP	Jennifer and Joseph [redacted]				
Address	[redacted]				
City/State/Zip	[redacted]				
Telephone Number	[redacted] Home	[redacted] Cell	[redacted] Work	Home	Cell Work
Email					

EXHIBIT

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Endrew [redacted]		[redacted]	11/16/2010
Legal Name of Student	State Student ID (SASID)	Date of Birth	Date

INDIVIDUALIZED EDUCATION PROGRAM

SECTION 4: PROCEDURAL SAFEGUARDS

I have been provided the special education procedural safeguards in my native language or other mode of communication. ☐ Yes ☐ No

Parent/Guardian/ESP Signature 300.504(a) — Date

SECTION 5: IEP PARTICIPANTS

THE FOLLOWING PARTICIPANTS ATTENDED THE IEP MEETING:

	Jennifer [redacted]	Joseph [redacted]
Student 300.321(a)(7); 300.321(b)(1)	Student's Parent/Guardian/ESP 300.321(a)(1)	Student's Parent/Guardian/ESP 300.321(a)(1)
Special Education Director or Designee 300.321(a)(4)(i)-(iii)	General Education Teacher 300.321(a)(2); 300.324(a)(3)(i)-(iii)	Special Education Teacher/Provider 300.321(a)(3)

THE FOLLOWING PERSONS WERE ALSO IN ATTENDANCE AT THE MEETING

NAME	TITLE	AREA/AGENCY REPRESENTED
Carrie Scott, M. Ed, BCBA	Clinical Director	Alta Vista Center for Autism
Maura Stack-Oden, MA, BCBA	Program Coordinator	Alta Vista Center for Autism
Sandy Houston	Advocate	IDEA Services

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Endrew [redacted]
Legal Name of Student | State Student ID (SASID) | [redacted] Date of Birth | 11/16/2010 Date

SECTION 6: PRESENT LEVELS OF ACADEMIC ACHIEVEMENT AND FUNCTIONAL PERFORMANCE INCLUDING INPUT FROM PARENT & STUDENT

Student Strengths, Preferences, Interests

What are the student's educational/developmental strengths, interest areas, significant personal attributes and personal accomplishments? Be sure to include specific feedback from the student.

300.324(a)(i) strengths of the child
300.321(b)(2) preferences and interests 300.43(a)(2)

Endrew's strengths include rote academic skills such as spelling and math facts. He is able to read at a first grade level. His interests include cause and effect type games, letter books, computer games, pacman and bingo. He enjoys spending time outside.

Present Levels of Educational Performance Summary

Include results of initial or most recent evaluation
300.324(a)(ii) Results of initial or most recent evaluation

The following assessments were completed: Woodcock-Johnson III Tests of Achievement, the Vineland II Adaptive Behavior Scales parent and teacher reports and the VB-MAPP.

Woodcock-Johnson III Tests of Achievement

Endrew's English oral language skills are very low when compared to others at his grade level. His English oral expression skills are low average; his English listening comprehension skills are very low. His overall level of achievement is low. Endrew's academic skills are low average. His academic knowledge, fluency with academic tasks, and ability to apply academic skills, are all within the very low range.

When compared to others at his grade level, Endrew's performance is low average in basic reading skills and math calculation skills; low in basic writing skills; and very low in broad reading, reading comprehension, math reasoning, and written expression. His knowledge of phoneme-grapheme relationships is low.

TABLE OF SCORES

Woodcock-Johnson III Tests of Achievement
Compuscore for the WJ III, Version 2.1
Norms based on grade 4.8

CLUSTER/Test	Raw	GE	EASY to DIFF		RPI	PR	SS(68% BAND)	AE
ORAL LANGUAGE (Ext)	-	K.6	<K.0	2.0	37/90	1	64 (60-68)	5-2
ORAL EXPRESSION	-	1.4	<K.0	3.5	65/90	10	80 (75-86)	6-10
LISTENING COMP	-	K.2	<K.0	1.2	15/90	0.3	59 (55-64)	5-10
TOTAL ACHIEVEMENT	-	2.1	1.7	2.7	18/90	2	70 (68-72)	7-6
BROAD READING	-	2.2	1.9	2.6	6/90	2	69 (67-71)	7-6
BROAD MATH	-	1.8	1.2	2.4	17/90	1	66 (64-69)	7-1
BROAD WRITTEN LANG	-	2.3	1.7	3.2	43/90	6	76 (70-83)	7-9
BASIC READING SKILLS	-	2.9	2.5	3.5	38/90	18	86 (84-88)	8-3
READING COMP	-	1.4	1.1	1.7	5/90	0.2	57 (53-60)	6-9
MATH CALC SKILLS	-	3.5	2.5	4.9	76/90	21	88 (84-92)	9-0
MATH REASONING	-	K.6	K.2	1.0	1/90	<0.1	51 (48-54)	5-9
BASIC WRITING SKILLS	-	2.0	1.6	2.5	14/90	3	72 (66-77)	7-5
WRITTEN EXPRESSION	-	1.8	1.3	2.6	34/90	1	67 (56-78)	7-1
ACADEMIC SKILLS	-	3.1	2.6	3.7	43/90	11	82 (79-85)	8-5
ACADEMIC FLUENCY	-	1.9	1.3	2.5	20/90	2	69 (64-75)	7-2
ACADEMIC APPS	-	1.3	1.0	1.7	5/90	0.2	56 (53-59)	6-7
ACADEMIC KNOWLEDGE	-	<K.0	<K.0	K.2	2/90	<0.1	45 (40-51)	4-7
PHONIGRAPH KNOW	-	1.6	1.3	1.9	19/90	4	74 (71-77)	7-0

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Vineland II Adaptive Behavior Scales
Parent Rating
Narrative Report

The Vineland Adaptive Behavior Scales, Second Edition (Vineland-II) measures the personal and social skills of individuals from birth through adulthood. Because adaptive behavior refers to an individual's typical performance of the day-to-day activities required for personal and social sufficiency, these scales assess what a person actually does, rather than what he or she is able to do. The Vineland-II assesses adaptive behavior in four domains: Communication, Daily Living Skills, Socialization, and Motor Skills. It also provides a composite score that summarizes the individual's performance across all four domains.

ENDREW [redacted] was age 10:8 on the interview date of June 2, 2010. The respondent was his Mother, Jennifer [redacted] Jennifer was administered the Vineland-II Parent/Caregiver Rating Form by MAURA STACK -ODEN.

The Adaptive Behavior Composite cannot be calculated because of two or more uncalculated subdomain scores. ENDREW's level of adaptive functioning within the Communication domain is moderately low for his age group. His standard score of 72 results in a confidence interval of +/-7 (65 to 79) at the 90 percent confidence level. His percentile rank is 3. Thus, his score in this area is higher than or equal to only 3 percent of his peers in the normative sample. He had an adaptive level of moderately low for the Receptive subdomain, low for the Expressive subdomain, and moderately low for the Written subdomain. ENDREW's age equivalents for the Communication subdomains are 5:6 for the Receptive subdomain, 3:7 for the Expressive subdomain, and 7:10 or the Written subdomain. Comparison of the Communication subdomain v-scores can provide insight into an individual's relative abilities. In ENDREW's case, the differences between subdomains were not significant or unusual in the frequencies at which they occur in the general-population norm sample. Comparison of Vineland-II domain standard scores also can provide further insight into an individual's relative abilities. In ENDREW's case, the differences between each domain and every other domain were not significant or unusual in the frequencies at which they occur in the general-population norm sample.

ENDREW's maladaptive behavior was also assessed and is found to be at the clinically significant level compared to the national Vineland-II norm group. His tendency toward internalization of emotional distress is at the clinically significant level while his tendency toward externalization of distress is at the elevated level.

Teacher Rating
Narrative Report

The Vineland Adaptive Behavior Scales, Second Edition, Teacher Rating Form (Vineland-II TRF) provides a comprehensive assessment of personal and social sufficiency for students aged 3 through 21 years in a school, preschool, or structured day care setting. Adaptive behavior refers to an individual's typical performance of the day-to-day activities required for personal and social sufficiency. Thus, the Vineland-II TRF assesses what a student actually does, rather than what he or she is able to do. For students aged 7 through 21 years, the Vineland-II TRF assesses adaptive behavior in three different domains: Communication, Daily Living Skills, and Socialization. For children 3 through 6 years old, the TRF also assesses adaptive behavior in a fourth domain, Motor Skills.

ENDREW [redacted] was age 10:9 when the Vineland-II TRF was administered on July 19, 2010. The teacher who rated his adaptive behavior was MAURA STACK-ODEN. The professional conducting ENDREW's evaluation was MAURA STACK-ODEN. ENDREW was previously classified with Autism.

The Vineland-II TRF Adaptive Behavior Composite standard score summarizes a student's performance across all adaptive behavior domains. ENDREW has an Adaptive Behavior Composite standard score of 56, which is Low when compared to other students his age in the TRF norm group. At the 90 percent confidence level, ENDREW's true Adaptive Behavior Composite score is likely to be within the range of 52 to 60 (confidence interval of +/-4). His score is higher than only less than 1 percent of students in the TRF norm group.

Different areas of adaptive functioning are assessed by the Communication, Daily Living Skills, and Socialization Domains. The Communication Domain evaluates the student's adaptive behaviors in talking, listening, reading, and writing. ENDREW's standard score of 65 in Communication is low for his age group.

Using a 90 percent confidence interval, his true score is likely to be in the range of +/-6 (59 to 71). His score is higher than only 1 percent of his peers in the normative sample.

ENDREW's standard score for the Daily Living Skills Domain is 56, which results in a 90 percent confidence interval of +/-6 (50 to 62). This score shows that his skills in managing personal needs; in understanding time, money, and math; and in following rules and routines are low for an individual of his age. His percentile rank for the Daily Living Skills Domain is less than 1.

The Socialization Domain assesses how a student interacts and gets along with others, as well as how he plays and uses leisure time. ENDREW's standard score in this domain is 53 with a 90 percent confidence interval of +/-4 (49 to 57). This score is low for his age group; he scores higher than only less than 1 percent of his peers in the normative sample.

A comparison of ENDREW's domain standard scores provides insight into his relative levels of adaptive functioning in these areas. ENDREW's domain scores are relatively equal and do not suggest a personal strength or weakness in any area.

The differences between pairs of ENDREW's domain standard scores were evaluated for statistical significance and for how frequently a difference of that size occurs in the general population. There is a significant difference at the .05 level between ENDREW's scores on the Communication and Daily Living Skills Domains, with Communication being higher, but this difference is not unusual. There is a significant difference at the .01 level between ENDREW's scores on the Communication and Socialization Domains, with Communication being higher, but this difference is not unusual. .

VB-MAPP

The VB-MAPP (Verbal Behavior Milestones Assessment and Placement Program)

The VB-MAPP provides an assessment of verbal operants, play, social skills and academics. The assessment is normed to a 4 year old.

Endrew demonstrated deficits in play, social skills and imitation at level 1 (normed to an 18 month old). He demonstrated deficits in play, social skills, imitation, intraverbals (preconversation skills), group skills and linguistic structure at level 2 (normed to a 30 month old). He demonstrated deficits in requesting, labeling, following directions, visual performance, play, social skills, writing, identification of feature, function and class, intraverbals (group instruction and linguistic structure at level 3 (normed to a 48 month old).

Endrew [redacted]		[redacted]	11/16/2010
Legal Name of Student	State Student ID (SASID)	Date of Birth	Date

Describe the age appropriate transition assessment process used to develop the post-school goals 300.320(b)(1)

This section to be completed for the first IEP to be in effect when the student is transition age, or earlier if deemed appropriate by the IEP team

NA

Student Needs and Impact of Disability

How does the student's disability affect his/her involvement and progress in the general curriculum and participation in appropriate activities?
300.324(a)(i) concerns of parent
300.324(a)(iv) academic, developmental, and functional needs (access skills)
300.320(a)(1) How the child's disability affects the child's involvement and progress—in the general curriculum and participation in appropriate activities

Endrew's diagnosis of autism has a pervasive impact on his ability to demonstrate his understanding of language, social nuance, and skills related to academic success. His current academic setting, a separate school facility, optimizes Endrew's strengths and allows structured development of language and school-related behavioral skills which will favorably impact his ability to access appropriate curriculum in the future.

Measurable Post-School Goals

This section to be completed for the first IEP to be in effect when the student is transition age, or earlier if deemed appropriate by the IEP team
What are the student's preferences, interests and desired outcomes in future post-secondary education, employment and independent living? Be sure to include feedback from the student
300.321(b) 300.43(a)(2)(i)-(v) extrapolated

Post-School Education/Training Goal:
300.320(b)(1)
NA

Employment Goal:
300.320(b)(1)
NA

Independent Living Skills Goal (when appropriate):
300.320(b)(1)
NA

Andrew [redacted]		[redacted]	11/16/2010
Legal Name of Student	State Student ID (SASID)	Date of Birth	Date

SECTION 7: CONSIDERATION OF SPECIAL FACTORS

A. Does this student exhibit behavior that requires a Behavior Intervention Plan?
☒ Yes ☐ No
If yes, generate Behavior Intervention Plan

See attached behavior intervention plan

300.324(1)(2)(i)

B. Is the student blind or visually impaired?
☐ Yes ☒ No
If yes, generate Learning Media Plan.

300.324(1)(2)(iii)

C. Is the student deaf or hard of hearing?
☐ Yes ☒ No
If yes, generate Communication Plan.

300.324(a)(2)(iv)

D. Is the student deaf-blind?
☐ Yes ☒ No
If yes, generate Learning Media & Communication Plan.

300.324(1)(2)(iii) & 300.324(a)(2)(iv)

E. Does the student require a Health Care Plan?
☒ Yes ☐ No
If yes, indicate location of Plan.

Drew has a tree nut allergy. The health care plan is located in the main file and emergency files. Epi-pen is located in the classroom first aid kit.

F. Does the student have Limited English Proficiency?
☐ Yes ☒ No
If yes, specify how this will be addressed:

300.324(a)(2)(ii)

G. Does the student need Assistive Technology devices or services?
☐ Yes ☒ No
If yes, specify:

300.324(a)(2)(v)

H. Does the student require Special Transportation?
☒ Yes ☐ No
If yes, specify:
Parents currently provide transportation. Seeking transportation provided by school district.

300.34 Related Services (a)
300.34 (c)(16)
300.107(b)

Legal Name of Student	State Student ID (SASID)	Date of Birth	Date
Endrew [redacted]		[redacted]	11/16/2010

SECTION 8: POST-SCHOOL CONSIDERATIONS
This section to be completed for the IEP to be in effect when the child is 15, but not later than the end of 9th grade 300.320(b)

Projected date of graduation/program completion: _____ 300.102(a)(3)(i)-(iii) limitation to FAPE
Projected type of completion document _____

Post-School Education/Training Goal (from Section 6: Measurable Post-School Goals): 300.320(b)(1)

Planned Course of Study: 300.320(b)(2)
NA
Transition Services and Activities: 300.320(b)(2)
NA
Agency/community supports that may provide transition services in the coming school year: 300.321(b)(3) participants in meeting
NA

Career Employment Goal (from Section 6: Measurable Post-School Goals)300.320(b)(1)

Planned Course of Study: 300.320(b)(2)
NA
Transition Services and Activities: 300.320(b)(2)
NA
Agency that may provide transition services in the coming school year: 300.321(b)(3) participants in meeting
NA

Independent Living Skills Goal (when appropriate) (from Section 6: Measurable Post-School Goals): 300.320(b)(1)

Planned Course of Study: 300.320(b)(2)
NA
Transition Services and Activities: 300.320(b)(2)
NA
Agency that may provide transition services in the coming school year: 300.321(b)(3) participants in meeting
NA

If the student will turn 20 during the course of this IEP period, student and parent(s) have been informed of the transfer of rights at the age of majority (21).
☐ Yes ☐ No ☒ N/A 300.320(c) *Transfer of rights at age of majority.*

NOTE: **Graduation will permanently end entitlement to a free and appropriate public education (FAPE) under the federal Individuals with Disabilities Education Act 2004 and the Colorado Rules for the Administration of the Exceptional Children's Educational Act. Therefore, after graduation this student will no longer be entitled to receive special education and related services from a school district or other local education agency.**

SECTION 9: ANNUAL GOALS AND/OR OBJECTIVES 300.320(a)(2)(i)

See attached Annual Goals and Objectives

Endrew [redacted]		[redacted]	11/16/2010
Legal Name of Student	State Student ID (SASID)	Date of Birth	Date

SECTION 10: ACCOMMODATIONS & MODIFICATIONS

Accommodations

What type(s) of accommodation(s) *if any* is (are) necessary for the student to access the general curriculum and/or appropriate activities to make effective progress?
300.320(a)(4)(i)-(iii)
300.320(a)(6)(i)

Endrew's current accommodations include: one on one academic instruction, positive reinforcement, time on task allotments which address his tolerance for learning new skills, errorless learning techniques, a visual schedule, and organizational aides which allow him to independently manage task initiation and completion.

Modifications

What standards, *if any*, need to be modified, expanded, and/or prioritized for the student to access the general curriculum and/or appropriate activities to make effective progress?

Reading/Writing Standard 1: Students read and understand a variety of materials.
Reading/Writing Standard 2: Students write and speak for a variety of purposes and audiences.
Reading/Writing Standard 3: Students write and speak using conventional grammar, usage, sentence structure, punctuation, capitalization, and spelling.
Reading/Writing Standard 4: Students apply thinking skills to their reading, writing, speaking, listening, and viewing.
Mathematics Standard 1: Students develop number sense and use numbers and number relationships in problem-solving situations and communicate the reasoning used in solving these problems.

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SECTION 11: EXTENDED SCHOOL YEAR DETERMINATION 300.106

Criteria/Inquiry:

Did the student experience significant regression on their IEP goals and objectives?
☐ Yes ☐ No

Did the student require an unreasonably long period of time to relearn previously learned skills?
☐ Yes ☐ No

Are there other factors relevant in determining eligibility for ESY services?
☐ Yes ☐ No

Decision: Is the student eligible for Extended School Year Services?
☐ Yes ☐ No ☐ To be determined by: _____
If yes, attach documentation for each question and record services on service summary in Section 13.
Identify which goals will be worked on during the Extended School Year Below:

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Legal Name of Student	State Student ID (SASID)	Date of Birth	Date
Endrew [redacted]	[redacted]	[redacted]	11/16/2010

SECTION 12: STATE/DISTRICT ASSESSMENTS:

District Assessments:

Check whether the student will participate in the District Assessment or the District Alternate for each content area(s) administered at the child/student's grade level. Check all that apply.

	Regular	Alternate	Not Assessed at This Grade Level
Reading/Writing/Language Arts	☐	☒	☐
Math	☐	☒	☐
Science	☐	☒	☐
Other_____	☐	☒	☐
Other_____	☐	☒	☐

If the student is eligible for the district alternate assessment, provide justification:
300.320(a)(6)(ii)(A) and (B)

List district assessment accommodations:
300.320(a)(6)(i)

State Assessments

Check whether the student will participate in the CSAP or CSAP Alternate for each content area(s) administered at the child/student's grade level. Check all that apply.

	CSAP	CSAPA or 11th Grade Alt.	ACT	Not Assessed at This Grade Level
Reading/Writing/Language Arts	☐	☒		☐
Math	☐	☒		☐
Science	☐	☒		☐
11th grade only:		☒	☐	☐

If the student will be participating in the CSAPA provide justification: 300.320(a)(6)(ii)(A) and (B)

List any CSAPA Accommodations/Adaptations:

Check all Standard Accommodations to be used in the CSAP Administration: 300.320(a)(6)(i)

Standard Presentation Accommodations

- ☐ No accommodations needed
- ☐ Braille version of the test
- ☐ Large-print version of the test (18 point font)
- ☒ Read aloud directions only
- ☐ Signing of directions only
- ☐ Oral presentation of entire test (science, math, writing only)
- ☐ Signing presentation of entire test
- ☐ Translated oral presentation of entire test
- ☒ Student receives more, but shorter sessions with "breaks" in between
- ☒ Student receives extended time
- ☐ Student uses additional manipulative for mathematics assessment

Standard Response Accommodations

- ☐ No accommodations needed
- ☒ Use of scribe to write oral responses or fill in bubbles in the test book (scribe)
- ☒ Use of scribe to write oral responses to constructed items only (scribe)
  - ☐ Use of signing as an alternative response (must also then scribe into test booklet)
- ☐ Use of assistive technology to communicate response to test items

Describe Non-Standard Accommodations:

Other Allowable Accommodations:

☒ If student is taking an alternate assessment, parents have been informed about the differences between regular and the alternate assessments (both state and district) and the [illegible] [illegible] including that, for students taking alternate assessments, their achievement will be measured based on alternate achievement standards.

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District IEP Report
7.23.2010
11.15.2010

Review of Current IEP (4.13.10)

Language Arts

1. Drew will read non-fiction texts and answer teacher directed questions from his reading.
    a. Criteria: 80% in ¾ consecutive trials with 2 or fewer verbal prompts
    b. AVCA BL: 100% accuracy with 2 or fewer verbal prompts
    c. MASTERED
2. Given a set of directions or steps Drew will read and follow the directions or steps.
    a. Criteria: 80% in ¾ consecutive trials with 2 or fewer verbal prompts
    b. AVCA BL: 89.5%2 with 2 or fewer verbal prompts
    c. MASTERED
3. Drew will use nonfiction text vocabulary to give written responses to questions
    a. Criteria: 80%
    b. AVCA BL: 94.5% accuracy
    c. MASTERED
4. Drew will use appropriate conventions to communicate via email.
    a. Criteria: 80% in ¾ consecutive trials
    b. AVCA BL: 0%
    c. Not mastered, keeping goal
    d. MASTERED: Drew is able to sign in and write an email independently. He requires prompting to write complete sentences in the email.

Mathematics

1. Given a variety of coins and dollars, Drew will accurately count money up to $5.00 and hand over correct amount.
    a. Criteria: 90% in 4/4 consecutive trials
    b. AVCA BL: Drew is able to ID coins with 95% accuracy, count like and varied coins up to $5.00 with 30.6% accuracy
    c. Not mastered, keeping goal
2. When identifying an object Drew wishes to purchase, he will be able to answer the question "Is that enough money?"
    a. Criteria: 90% in 4/4 consecutive trials
    b. AVCA BL: 8% accuracy
    c. Not mastered, keeping goal
3. Given a word problem, Drew will be able to identify which operation (addition, subtraction, multiplication or division) to use to solve the problem.
    a. Criteria: 90% in 4/4 trials
    b. AVCA BL: 5% accuracy overall. Drew identifies to use addition in all problems.
    c. Not mastered, keeping goal will amendment: ID addition and subtraction only. Teach in functional situations
4. Uses oral/written language to communicate an understanding of number sense
    a. Critiera: 90% in 4/4 consecutive trials

b. AVCA BL: did not take baseline on this goal

5. Drew will learn his multiplication facts 6-10
   a. Criteria: 90% in 4/4 consecutive trials
   b. AVCA BL: 29% accuracy
   c. Not mastered, keeping goal
6. Drew will learn his division facts 0-5
   a. Criteria: 90% in ¾ consecutive trials
   b. AVCA BL: 15.6%
   c. Not mastered, not keeping goal

Communication and Basic Language Skills

1. Drew will engage in appropriate turn taking skills by attending to a peer's turn and waiting for his own turn
   a. Criteria: 4/5 opportunities with 1 or fewer verbal prompts
   b. AVCA BL: 47% accuracy with 1 or fewer verbal prompts
   c. Not mastered, not keeping specific goal, amend to interactive games with peers and adults
2. Drew will demonstrate 2 appropriate verbalizations during game play with at least 1 peer
   a. Criteria: 2 occurrences with 1 or fewer verbal prompts
   b. AVCA BL: taken with adults, 65.7% accuracy with 1 or fewer verbal prompts
   c. Not mastered, not keeping specific goal, amend to interactive games with peers and adults
3. In a small group, Drew will answer open ended questions with a topic related response, demonstrating 2 out of 3 successes per opportunity
   a. Criteria: 2/3 successful times per opportunity
   b. AVCA BL: 25% accuracy
   c. Not mastered, not keeping specific goal, amend to be included as a target within group instruction goal
4. Using scripted language, Drew will ask a peer questions
   a. Criteria: 1/3 successes
   b. AVCA BL: 28.9% accuracy
   c. Not mastered, not keeping specific goal, amend to interactive games and group instruction (target incidentally)
5. Drew will advocate for himself in the school environment by indicating his needs
   a. Criteria: Performs activity with verbal/gestural cues in 4/5 consecutive trials
   b. AVCA BL: Currently collecting manding data as rate per half hour
   c. Not mastered, not keeping specific goal, amend to increase rate of mands, increase variety of mands, increase mands for social interaction, increase social quality of mands

Physical

District IEP Report
7.23.2010
11.15.2010

1. To demonstrate functional motor skills and to provide an opportunity for independent sensory input, Drew will utilize playground swings
    a. Criteria: performs activity with verbal/gestural cues in ¾ consecutive trials
    b. AVCA BL: Drew engages in swinging independently when following PE schedule. He requests pushes 61.5% of the time and swings without pushes 38.5% of the time
    c. MASTERED

Inter-Intrapersonal

1. Drew will use a structured format to identify the cause of his stated feeling.
    a. Criteria: 70% with 2 or fewer verbal prompts
    b. AVCA BL: 58.3% accuracy with 2 or fewer verbal prompts
    c. Not mastered, keeping goal
2. Drew will learn to identify when his engine is high.
    a. Criteria: 75% with 2 or fewer verbal prompts
    b. AVCA BL: 12.5% accuracy
    c. Not mastered, amend goal to be included in identifying emotions and adaptive behavior goal of systematic desensitization and inhibition training
3. Drew will demonstrate knowledge of peers' names as related to his job
    a. Criteria: 70% with 2 or fewer verbal prompts
    b. AVCA BL: 100% accuracy
    c. MASTERED

Alta Vista Center for Autism

Behavior Reduction and Skill Replacement Program

Name: Endrew [redacted]

Date Implemented:
Date Discontinued:

Objective: To obtain a reduction of inappropriate behaviors (climbing, crying, dropping, eloping, loud vocalizations, perseverative language, physical aggression, picking, self injurious behavior, and verbal aggression). Skill replacement procedures to be implemented include differential reinforcement of appropriate behaviors, functional communication training, increased tolerance to feared and aversive conditions, increase tolerance to delayed and denied access, Increase positive affect, increase items and activities which function as reinforcers, and increase use of adults to assist in regulating emotional state.

Target Behavior:

Behavior 1: Climbing: Any act or attempt to lift self off floor onto furniture and or people. Score occurrence separated by Endrew's feet on floor.

Behavior 2: Crying: Any act resulting in tears.

Behavior 3: Dropping: Any act or attempt in which Endrew falls/removes self from furniture, landing on knees and or bottom. Score each occurrence separated by Endrew's standing with feet on floor.

Behavior 4: Eloping: Any act or attempt to leave designated area either by walking, running or rolling across floor. Score each occurrence separated by movement toward designated area.

Behavior 5: Loud Vocalizations: Any act of screaming or yelling words or sounds above a conversational volume. Score each occurrence.

Behavior 6: Perseverative Language: Utterances repeated more than one time (following the acknowledgement of first utterance) relating to the same topic, request or comment. Score as partial interval occurrence per 5 minute interval.

Behavior 7: Physical Aggression: Any act or attempt to hit or kick other person. Score each occurrence.

Behavior 8: Picking: Any act or attempt to peel material from shoes, nose and/or scrape finger or object at tooth.

Behavior 9: Self Injurious Behavior: Any act or attempt to hit self (hand to bottom) or head bang (hit head against objects).

Behavior 10: Verbal Aggression: Any act of stating "I hate you" or "Stupid, stupid head"

Assessment/Functional Analysis:

	Date Completed
Behavioral observation (anecdotal report)	5/12/10-7/26/10
ABC Data Collection	7/26/10-8/1/10

Procedure: Transitions based upon task completion
Teacher Action: Given the end of a task/level, Endrew will receive reinforcement such as access to preferred activities or attention

Procedure: Inferential/attunement statements
Teacher Action: Teachers will make comments inferring what Endrew may be feeling or needing to assist him in identifying his own needs. For example "It seems like you might be getting hungry".

Skill Acquisition:
Student Behavior: Endrew will use Functional communication and replacement language to request items, activities, help and protests.
Procedure: Differential reinforcement, prompt replacement language
Teacher Action: Given a situation in which Endrew is seeking an item, activities, help or protesting an activity or item, teacher will model/prompt a request such as "I need to find the piece."

Student Behavior: Endrew will increase his tolerance to feared and aversive items, activities and conditions such as flies, dogs, spilling liquids and losing at a game
Procedure: Cognitive behavior therapy, systematic desensitization, shaping and reinforcement.
Teacher Action: Teachers will systematically present feared and aversive items, activities and conditions with increasing demands to tolerate their presence using reinforcement and shaping procedures.

Student Behavior: Endrew will increase his tolerance to delayed and denied access to preferred activities and items.
Procedure: Cognitive behavior therapy, systematic desensitization
Teacher Action: Teachers will systematically delay and deny access to preferred activities and items following systematic and specified teaching steps.

Student Behavior: Endrew will increase duration of positive affect.
Procedure: Sensory social and joint attention routines, partial interval data on smiling and laughing
Teacher Action: Teachers will engage in sensory social and joint attention routines to build rapport with Endrew and increase his enjoyment of interpersonal interaction. Data is collected as 5 minute partial interval occurrence of smiling and laughing.

Student Behavior: Endrew will increase the items and activities that function as reinforcers.
Procedure: Systematic conditioning of new reinforcers
Teacher Action: Teachers will pair mildly and moderately preferred activities with highly preferred activities to condition them as reinforcers.

Student Behavior: Endrew will use adults to regulate emotional state.
Procedure: Rapport building, systematic teaching of self regulation skills
Teacher Action: Teachers will engage in sensory social and joint attention routines to build rapport with Endrew. Teachers will systematically teach specific skills to use adults to help in regulating emotional state.

Reinforcement: Endrew has access to reinforcement in a variety of forms throughout the day. Endrew has access to social praise, interaction and attention from staff when he is not exhibiting target behaviors. Access to tangibles and other activities occurs contingently based upon task completion

- Redirection: teachers will prompt to return to task
- Shaping: teachers will differentially reinforce subsequent approximations

Student Behavior: Perseverative Language
Procedure: Selective attention, tolerating delayed and denied access.
Teacher Action: Acknowledge first request, use first, then statements and visuals for delayed access. Provide selective attention to Endrew when he is not engaging in Perseverative language.

Student Behavior: Physical Aggression
Procedure: block, redirection/functional communication, shaping, inferential/attunement statements
Teacher Action:

- Block: teachers will block Endrew from engaging in physical aggression
- Redirection: teachers will verbally prompt/provide replacement language such as "I want to find the piece"
- Shaping: teachers will differentially reinforce subsequent approximations
- Inferential/Attunement statements: teachers will make comments inferring what Endrew may be feeling/needing to assist him in identifying his own needs, for example "It seems like you want to go find something."

Student Behavior: Picking
Procedure: selective attention, redirection, shaping
Teacher Action:

- Selective attention: teachers will provide attention only in the form of prompts to return to task and shaping back to task
- Redirection: teachers will prompt to return to task
- Shaping: teachers will differentially reinforce subsequent approximations

Student Behavior: Self Injurious Behavior
Procedure: block, redirection/functional communication, shaping, inferential/attunement statements
Teacher Action:

- Block: teachers will block Endrew from engaging in self injurious behavior
- Redirection: teachers will verbally prompt/provide replacement language such as "I want to find the piece"
- Shaping: teachers will differentially reinforce subsequent approximations
- Inferential/Attunement statements: teachers will make comments inferring what Endrew may be feeling/needing to assist him in identifying his own needs, for example "It seems like you want to go find something."

Student Behavior: Verbal Aggression
Procedure: selective attention, redirection, shaping
Teacher Action:

- Selective attention: teachers will provide attention only in the form of prompts to return to task and shaping back to task
- Redirection: teachers will prompt to return to task
- Shaping: teachers will differentially reinforce subsequent approximations

Data Collection and Evaluation:

Endrew [redacted]

The Alta Vista Center for Autism
Behavior Intervention Plan (BIP)
Approval Sheet
(Modified environment, redirections, functional communication training, blocking, shaping, and inferential/attunement statements, selective attention)

I,_____, (parent/guardian) understand the procedures described in this behavior reduction plan and agree to the implementation of this plan. I understand that this plan will be systematically evaluated to determine its effectiveness and those changes may be made to this plan if the intervention is found to be ineffective. I understand that I can contact the Program Coordinator, Maura Stack-Oden, or Clinical Director, Carrie Scott at 303-759-1192 if I have any questions about this plan or would like to withdraw my consent for the procedure(s).

Parent Signature Date

Witness Date

Occupational Therapy Assessment
Alta Vista Autism Center

Name: Endrew [redacted]
Date of assessment: 8/18/2010
Date of birth: [redacted]
Age: [redacted]

Background information:

Endrew is a 10 year old boy diagnosed with autism. He attends the Foundations of Learning at the Alta Vista Autism Center for school 5 days a week. He was recommended by his program coordinator for observation and assessment for occupational therapy regarding his handwriting.

Assessments used:

The Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI) was administered to Endrew in addition to the WOLD Sentence Copying Test.

Results:

Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI)

	Raw Score	*Standard Score*	*Percentile Rank*	*Age Equivalent*
Visual Motor Integration	12	65	1st	5.6
Visual Subtest	13	61	.9th	5.1
Motor Subtest	5	<45	.02nd	<3.0

The VMI assessed Endrew's ability to integrate visual and motor skills, or eye-hand coordination, which is important in the school setting for writing tasks. Endrew scored below average for his age in all three categories. His Visual Motor Integration score assessed his ability to copy a series of different shapes, which include a vertical line, a horizontal line, a circle, and a cross. His Visual Perception score tested his ability to identify the same design, which varied in size, orientation, and shape in a series of 3-4 options. Endrew scored the lowest of the three subtests in Motor Coordination test demonstrating significant difficulty with motor control of his pencil with paper and pencil tasks on the VMI, which affects his ability to control his pencil while writing for school-work.

When completing the VMI Endrew demonstrated decreased postural control and increased distractibility perseverating on shutting down the computer. He appeared to rush through all of the subtests of the VMI, which may have contributed to his low scores. Endrew was also observed with increased arousal, climbing on the desk. His teacher provided him with a puzzle and he appeared to calm down with that activity and was able to carry out all of the planned testing for the day.

Endrew also completed the WOLD Sentence Copying Test. He demonstrated a consistent right hand preference both on the VMI and on the WOLD. He demonstrated decreased bilateral coordination not stabilizing his paper with his non-preferred hand

while writing. Endrew held his pencil with 4 fingers, demonstrating decreased separation of his hand. While writing he was able to write with his pencil sitting in his webspace, which is the appropriate location for a writing utensil to sit. Endrew had to complete this test two times because he was unable to utilize the given lines on the test. When provided with 1" lines, Endrew demonstrated improved legibility however, he continued to write with decreased alignment, sizing, and spacing both between words and letters affecting overall legibility. He also omitted letters when copying, leaving his letters per minute score undeterminable. One factor that greatly impacts the legibility of Endrew's writing is that he writes letters on top of already written letters, a visual spatial and motor planning deficit.

Recommendations:

It is recommended that Endrew [redacted] receive 1 hour of direct occupational therapy a month at Alta Vista Autism Center to address fine motor and handwriting deficits. Improving Endrew's fine motor and writing skills will promote improved participation in school and everyday activities. Moreover, addressing his postural strength and endurance and overall sensory processing would benefit in Endrew's ability to sit upright while writing while maintaining an appropriate a regulated arousal state.

Corey Bralower, MS, OTR

Speech Language Consultation

Name: Endrew [redacted]
Date of Birth: [redacted]
School: Alta Vista Center for Autism
Clinician: Francine Alberts, M.A., CCC-SLP
Date: 9/15/2010

The Program Coordinator (PC) of Drew's classroom, Maura Stack-Oden, requested this consultation in order to get more information about Drew's speech, language and communication skills for his IEP. The evaluation consisted of observing Drew in his class, interacting with him directly on both informal and formal language tests, and discussion with his PC and case manager.

Articulation and Voice

Drew's speech can be difficult to understand for a variety of factors, including speech sound errors, high pitch, and off-topic responding/word choice. Numerous sound substitutions are present including W/L, F/TH, B/V and W/R. Other inconsistent errors are present as well. Drew was able to produce TH in words and L in isolation during our session but does not yet produce them in spontaneous speech. He was unable to produce R. He was heard to produce some words with V correctly in conversation but B for V substitutions are present as well. When Drew is not understood his teachers support him by asking him to clarify his message by repeating, asking for more information or asking him to spell the word. These strategies seemed to be working and Drew was observed calmly spelling a word when his teacher did not understand what he was saying. His teachers report that at times they cannot figure out what he is talking about, usually because it is something they are unfamiliar with or does not make sense in the context.

While he does use a high-pitched voice at times, this was not the main factor in why he was not understood and it would be difficult at this time for Drew to modify his behavior and alter his pitch. Improving Drew's intelligibility should focus on use of V, L and TH, increased sentence length and complexity, improved social interaction and his ability to clarify.

Language and Communication

Drew was given a few subtests of formal language tests and completed informal language tasks with the clinician. The Antonyms and Synonyms subtests of the CASL (Comprehensive Assessment of Spoken Language) were given to assess Drew's word knowledge (vocabulary). On the Antonyms subtest he was required to tell an opposite when given a word and on the Synonym subtest he had to choose what word, from a group of four words read to him, meant the same as the target word. Both tests yielded age equivalencies at about the six year-old level. His ability to following oral directions was assessed using a subtest of the CELF-4 (Clinical Evaluation of Language Fundamentals). Age equivalency on this subtest was four years, two months. In addition, the Sentence Completion subtest of the CASL was given. This test looks at work knowledge, like the Antonyms and Synonyms subtests do, but it looks at in context, meaning the student is given a sentence and a picture and he must understand the vocabulary and syntax of the sentence to be able to fill in a word that makes sense. Examples include: He turned the key

but the door would not_____ (open). Drew's age equivalency on this test was 3 years, 8 months. Drew got the first seven items correct but then struggled. Examples of items that were difficult for Drew include: She did not want to play soccer because the ball was too hard too_____(Drew answered *play* and then too *soft*); Cassie had to run to catch the school bus so she wouldn't be ____ (Drew answered *running* and then *not*). The Grammatical Morpheme subtest of the CASL was also given; this assesses a student's understanding of how word endings and verb tenses and other grammatical structures that add meaning. For example, hat is to hats as dress is to ____ (dresses) is assessing plurals. Drew's age equivalency on this subtest was six years, 5 months, which is in the same range as his Antonym and Synonym subtests. This was consistent with reports from his teachers that he does not use verb tenses, some pronouns and other grammatical structures correctly. Comprehension of longer, more complex language was shown to be difficult for Drew on the Directions, Sentence Completion and Grammatical Morphemes subtests, while his word knowledge at the single word level was stronger.

Drew was able to give basic information to describe which item he wanted on a high shelf and tell information about his cats, including size and color. He was able to answer simple WH type questions about a simple story but does not answer Yes/No questions accurately. Drew was able to follow some simple one-step directions with stickers and paper. During this activity he looked at the clinician consistently to indicate he was ready for the next direction. When asked, he would also repeat back the direction with the clinician before carrying out the action and this seemed to help him stay focused and more successful. Drew uses very simple and usually short sentences to communicate that do not contain complex grammatical forms such as varied verb tenses. Also, use and understanding of prepositions and other language concept words is weak.

Summary

This assessment showed the focus of Drew's speech and language goals should focus on improving his understanding and use of longer, more complex sentences. He has some basic language skills and when he was engaged he showed he was able to use them effectively in an interaction. But it also was apparent he has significant difficulty understanding longer directions and telling more than a few words about a picture/event. In addition, work on improving his production of V, TH and L should be included in his program this year. This, combined with reinforcing Drew's ability to clarify when he is not understood, will improve his overall communication. Two hours of speech therapy per month is recommended to work on the goals discussed above. This will include both direct time with Drew and consultation with his program coordinator and teachers.

Submitted by:

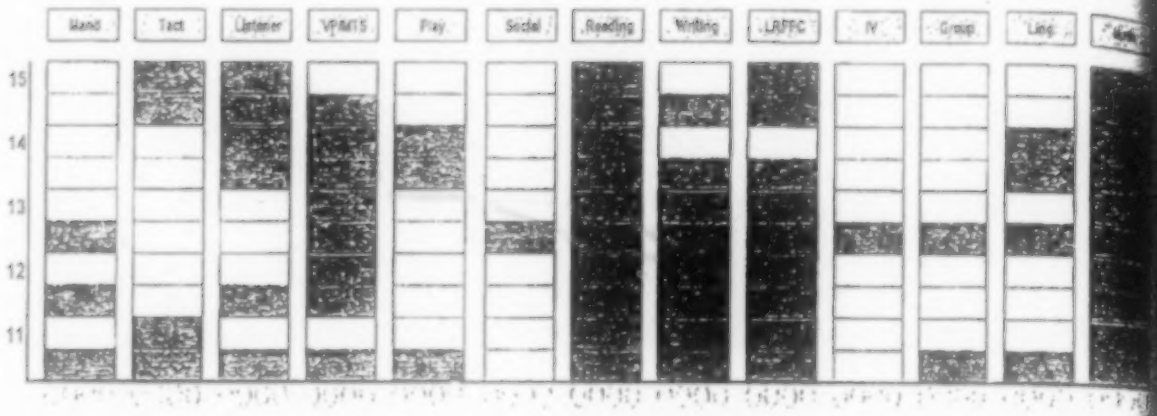
Francine Alberts, M.A., CCC-SLP
Speech Language Pathologist

VB-MAPP
Master Scoring Form

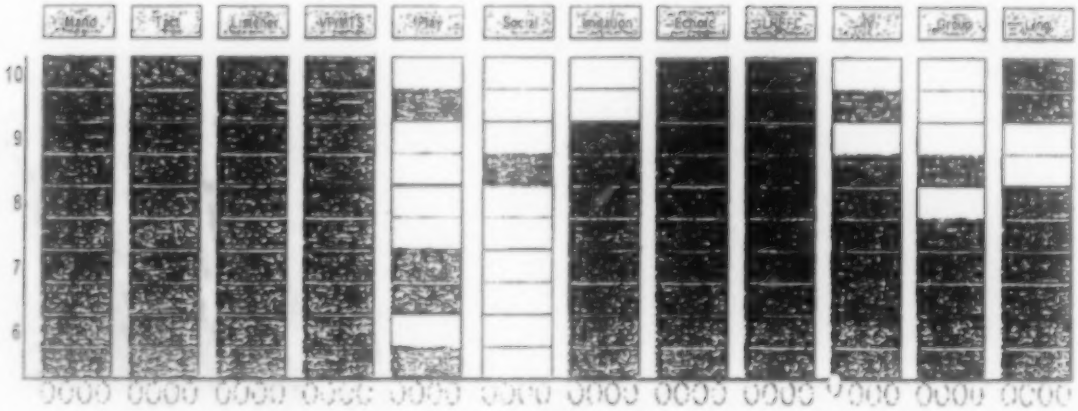
Child's name:	Endrew[redacted]
Date of birth:	[redacted]
Age at testing:	1 10 2 3 4

Key	Score	Date	Color	Tester
1st test	120.5	7/1/2010	[redacted]	MSO
2nd test				
3rd test				
4th test				

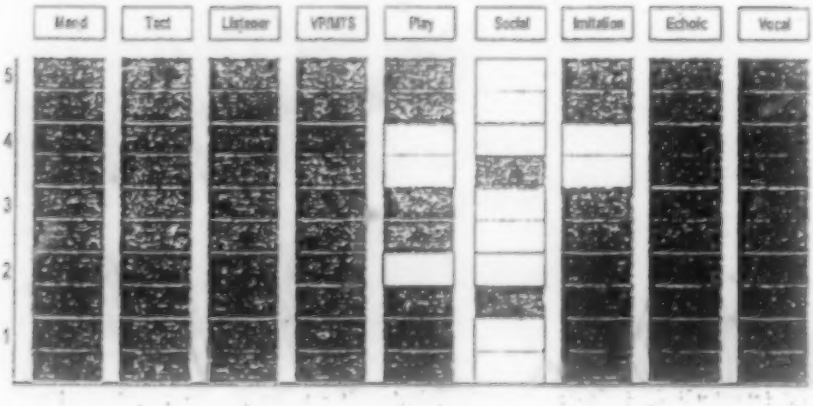
LEVEL 3



LEVEL 2



LEVEL 1



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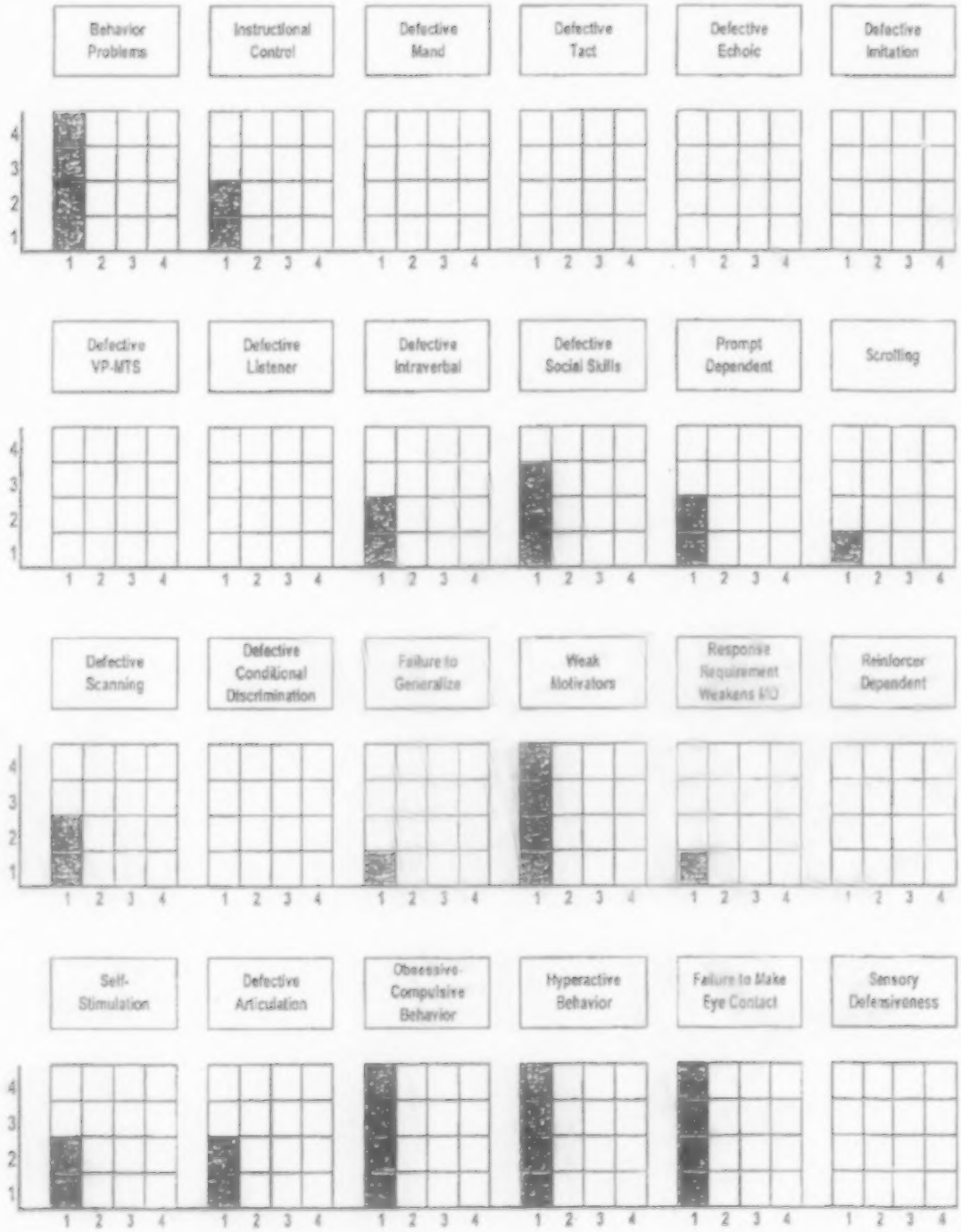
VB-MAPP
Language Barriers Scoring Form

Child's name:	Andrew [redacted]
Date of birth:	[redacted]
Age at testing:	1 | 10 | 2 | | 3 | | 4 |

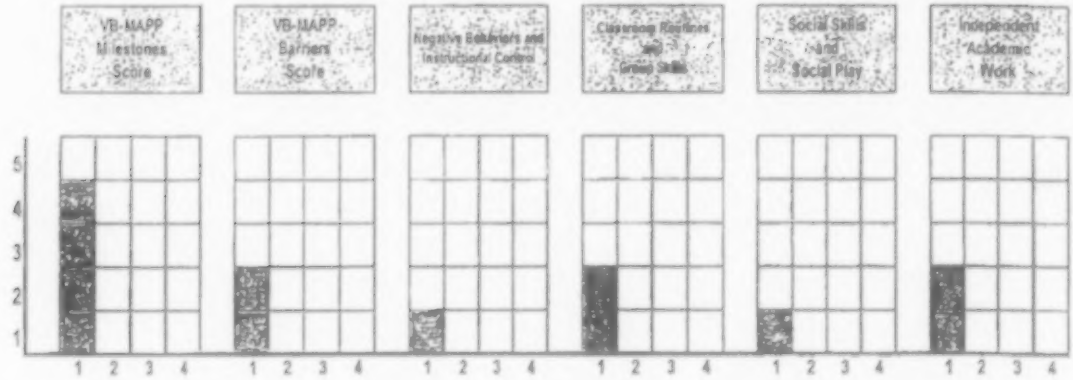
Key:	Score	Date	Color	Tester
1st test:	38	Jul-10	[redacted]	MSO
2nd test:				
3rd test:				
4th test:				

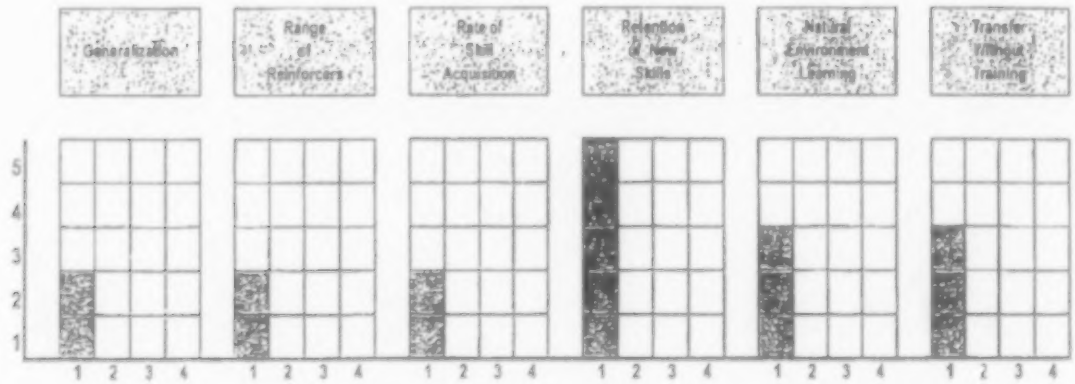


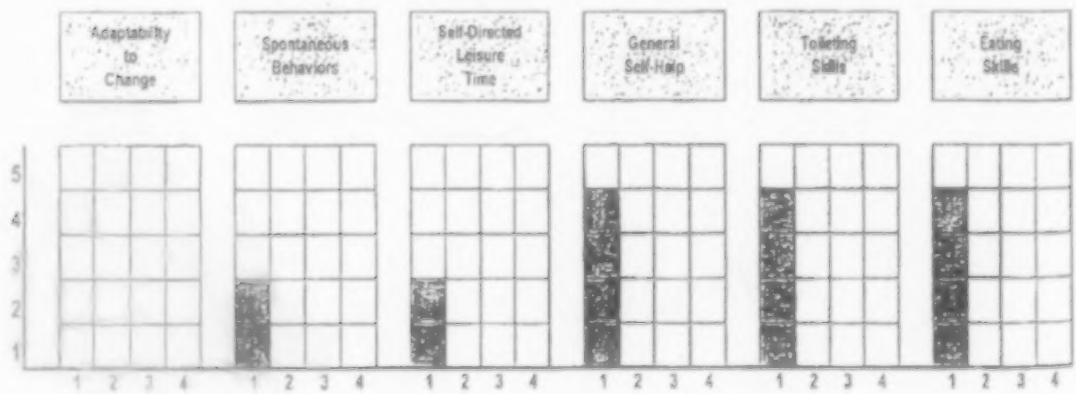
VB-MAPP
Transition Scoring Form

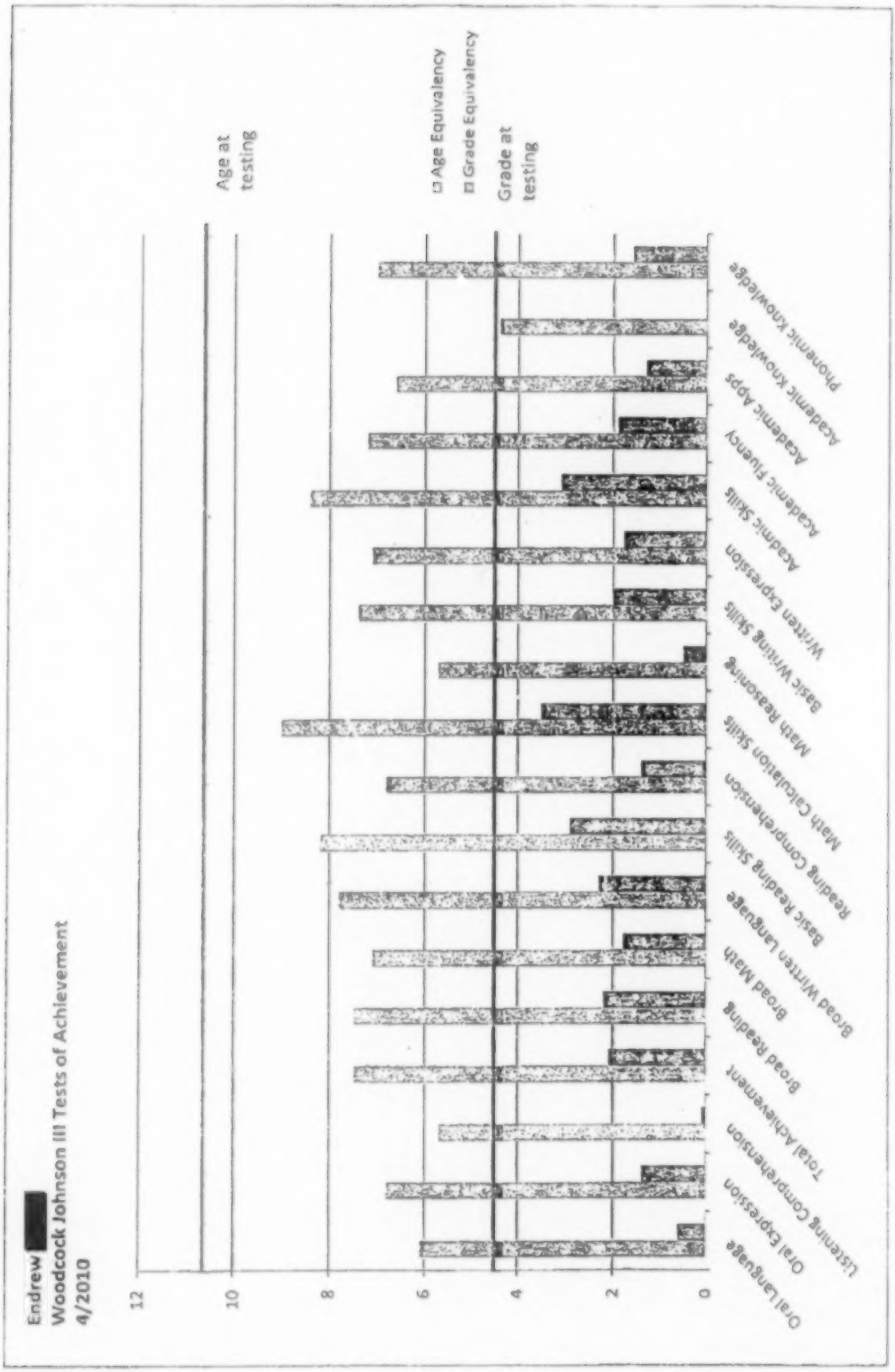
Child's name:	Endren Farren
Date of birth:	9/28/1999
Age at testing:	1 10 2 3 4

Key	Score	Date	Color	Tester
1st test: 8/10/10	45.0	7/1/10		MSO
2nd test:				
3rd test:				
4th test:				








Endrew
Woodcock Johnson III Tests of Achievement
4/2010
Age at testing
Age Equivalency
Grade Equivalency
Grade at testing
12
10
8
6
4
2
0
Oral Language
Oral Expression
Listening Comprehension
Total Achievement
Broad Reading
Broad Math
Broad Written Language
Basic Reading Skills
Reading Comprehension
Math Calculation Skills
Math Reasoning
Basic Writing Skills
Written Expression
Academic Skills
Academic Fluency
Academic Apps
Academic Knowledge
Phonemic Knowledge

Alta Vista Center for Autism
Annual Educational Report

Name: Endrew [redacted]
Date of Birth: [redacted]
Chronological Age: 11 years
Date of Entry to AVCA: May 10, 2010
Date of Report: September 23, 2010
Re-evaluation Due Date: April 29, 2011
Program Coordinator: Maura Stack-Oden MA, BCBA
Case Manager: Jennifer Beaty M.Ed.
Assistant Teachers: Melanie Bechtell, Dave North, Melissa Joiner, Maura Seidel
Speech/Language Pathologist Consultant: Francine Alberts, M.A., CCC-SLP
Occupational Therapist Consultant: Cory OTR/L
Clinical Director: Carrie Scott, M.Ed., BCBA

Background:

Before Endrew was admitted to the Alta Vista Center of Autism, he was enrolled at Summit View Elementary in Highlands Ranch, Colorado. Endrew is an 11 year old boy with hazel eyes and dirty blonde hair. Endrew lives with his parents, Jennifer and Joe, and little brother, Adam.

Student Profile:

General Strengths and Needs

Endrew is successful in using the computer and navigating through the internet to access information, games, email, and music. Endrew has a relative strength in understanding one step oral and written directions that are given to him by a teacher. He is able to label and access materials that are missing. His manding repertoire has started to increase since his first day, and is now requesting items by name. Endrew has strengths in visual spatial activities (puzzles, word searches, and gross motor activities). Endrew shows strengths in math and is successful in basic math skills (addition, subtraction, multiplication, and time).

Endrew's weaknesses include his ability to functionally communicate emotions, requests for objects, and needs. Endrew does not actively engage with other peers in play or social routines. Endrew frequently engages in parallel play when peers are present. Endrew has a weakness in interactive skills, but skills are emerging with the help of scripted characters and games (Teletubbies and Penguin Diner). Endrew has difficulties transitioning through activities if task has not been completed. Endrew has difficulties overcoming his compulsions through the day, and they often interfere with his learning environment. He is strongly motivated to engage in behaviors such as turning off computers, perseveration around these areas is a major barrier to Endrew fully participating and being accessible for learning. Endrew presents with a variety of severe fears such as

using new or public restrooms which limit his ability to participate in the community. Endrew has difficulties with fine motor activities (cutting and writing).

Communication

Endrew is a verbal communicator who responds in short phrases during preferred activities (usually involving access to the computer). Endrew reverses certain sounds and it can be difficult to decipher what he is saying (r/w,). When he seems to be anxious (moving, speaking, breathing fast), he speaks in a high-pitched tone that can be difficult to understand. Endrew has created labels for objects and people that are incorrect and it can be hard to decipher what he is trying to convey (colors for streetlights, across for down, Emma for dad, and more for tomorrow). When he is misunderstood, Endrew is asked to write what he is saying down, asked to draw it, or asked to type or Google it for clarification. He is very compliant with these requests.

Endrew uses verbal prompts to increase his responses in answering questions, asking questions, and expressing feelings. Endrew is inconsistent using eye contact and gestures when interacting with a communicative partner. Endrew is often prompted with verbal language and gestures to reference a communicative partner. Endrew does not initiate conversations or social interactions unless he is referencing a preferred activity.

Endrew is given functional replacement language when he engages in loud vocalizations or crying episodes. He is also provided with a functional phrase to replace a non-functional one (such as colors for streetlights).

Learning Style

Endrew's skill acquisition programs are taught at a desk using discrete trial techniques. Endrew is a visual and kinesthetic learner. When Endrew is learning new activities, he requires modeling, verbal, and gestural prompts. His physical prompt are limited to his hygiene routine. As Endrew becomes more independent with his programs, his prompts are faded to help ensure independence and total acquisition of the skill. Teachers use backward chaining and errorless teaching methods to guarantee success for programs that contain multiple steps.

Endrew is provided with visual supports to help him be successful. He also uses a token economy board to help build momentum through new skill acquisition programs. Endrew uses a visual flip schedule to add structure to his environment.

Learning Environment

Endrew's learning environment consists mainly of the Foundations of Learning classrooms. His learning environment is enhanced by alternative locations at Alta Vista Center for Autism. The alternative locations consist of the lunch room, playground, big room, and bathrooms.

Endrew spends most of his day in Foundations of Learning classroom one. Endrew shares his learning space with one another student and shares

classroom space with 4 other students. Each student is allocated a desk for learning time. Endrew's academic materials are located right behind his desk, and in movable shelving that is to the right of his desk. He sits on a therapy ball chair to access his desk and complete academics. Within the classroom, there is a leisure area for activities such as listening to music and watching movies, and a computer for the student's use. Within the connecting classroom, there is a group table for group lessons, and an entertainment area that consists of a computer, television, and piano keyboard.

Endrew attends to a visual schedule that is organized in an index card organizer. His schedule is set up daily by staff. At the present time, Endrew needs gestural and verbal prompts to attend to his schedule while transitioning off breaks and through academics. Endrew has a token economy board for motivation and reinforcement. Currently, Endrew earns eight tokens on a variable ratio schedule. He is encouraged to choose his reinforcement immediately following the current break.

During lunch, Endrew chooses his seat at one of three tables. Endrew eats independently, but at times needs a verbal prompt to take smaller bites. When he has sandwiches for lunch, staff cuts up the sandwich into more manageable pieces for him to eat.

Endrew is flexible when aversive conditions such as terminating a preferred activity or losing at a game present themselves across learning environments. He is able to transition between rooms and academics frequently without target behaviors.

Student Preferences

Endrew's preferred activities include: accessing the computer and playing a variety of games, watching videos on YouTube, Teletubbies, puzzles, dancing, art projects (finger painting, coloring, and assembling items), word searches, and puzzles.

Endrew has taken a particular interest in Teletubbies and Penguin Diner. He has been able to seek social interactions from imitating various schemas associated with the games.

Daily Classroom Routines

DAILY SCHEDULE:

Arrival: Endrew will arrive at 9:00 am. Endrew arrives with his parent. Endrew walks in through the Big Room with staff and places backpack and other belongings in his locker. Endrew takes out his go home notebook and places it in the designated area in the classroom. Endrew needs gestural prompting to place notebook in proper place. Endrew will have a computer time once he enters the classroom. The break is not timed, but based on completion of activity. Usually, the break is around five minutes.

Schedule:

After computer break, he will sit at his desk and start his schedule. Endrew will open the index file that has his academics listed. He will match the academic to the appropriate drawer and pull out the materials. When Endrew has completed

the task in the file, he will be placing the folder in the ALL DONE bin located in his cabinet. (His cabinet is directly behind him. The bin is on the top shelf.) In every folder, Endrew has two tasks to complete (unless one task is an extended task). Endrew will earn tokens for his board during his academics. Once all eight tokens are earned, Endrew will have access to his reinforcement. When the break is finished, he will then return back to his desk to check his schedule.

Lunch:

Endrew goes to lunch at 12:00. He will independently acquire his lunchbox from his locker on his way to the lunchroom. Before eating lunch, Endrew will wash his hands at the sink in the lunchroom.Once lunch is completed, he will walk with staff back to his locker to independently put his lunchbox in his backpack. After his lunch is put away, Endrew will have recess time with his peers.

Departure:

Endrew starts to pack up his backpack at 2:50. Endrew will grab his go home notebook and place notebook in his backpack. Endrew walks out to his parent's car through the Big Room.

Bathroom

Endrew needs verbal prompting to use the restroom in the morning and in the afternoon. When Endrew uses the restroom, he needs some prompting to complete all steps. Currently, Endrew has shown anxiety about using restrooms in public places. This has been observed during the three field trips that he has taken with Alta Vista Center for Autism.

Description of Schedule

Endrew's schedule consists of a 6-drawer rolling organizer, an all done bin, and an index card container. The index card container is always on his desk. The six drawers contain academic labels for the academics that he will engage in that day. The drawers also contain file folders that have the academics inside of them. There are two activities for every folder. The index container contains the same academic labels in the order he will complete the tasks. Endrew will match labels from top to bottom on the left side of the organizer, and then move to the top of the right side of the organizer. All the materials Endrew needs for the folders that are placed in the organizer are located in a 3 ring binder labeled: Drew's Daily Work. This binder is located on the bottom shelf of his cabinet. Inside the binder, there are sleeves that are labeled with each academic.

Group Participation

Endrew participates in morning group daily. Group is help between 9:30 and 10:00 a.m. During morning group, Endrew and his peers complete a journal entry and calendar items. Endrew consistently participates in group, but needs verbal and gestural prompting to complete his journal entries.

Skills targeted during group participation are requesting, turn taking, appropriate voice level, following verbal and written instructions, and fine motor skills.

Maladaptive Behaviors

Behavior 1: Climbing: Any act or attempt to lift self off floor onto furniture and or people. Each act or attempt is scored as one occurrence. Each occurrence is separated by Endrew's feet on the floor. Data for climbing is taken in rate per half hour.

Behavior 2: Crying: Any act resulting in tears. Data for crying is taken as duration of each episode per half hour.

Behavior 3: Dropping to Ground: Any act or attempt in which Endrew falls/removes self from furniture, landing on knees and/or bottom. Each occurrence is separated by Endrew's standing with feet on floor. Data for dropping is taken as rate per half hour.

Behavior 4: Eloping: Any act or attempt to leaves designated area wither by walking, running, or rolling across the floor. Each occurrence is separated by movement towards designated area. Data for eloping is taken as rate per half hour.

Behavior 5: Loud Vocalizations: Any act of screaming or yelling words or sounds above a conversational volume. Data for loud vocalizations are taken as partial interval per five minutes.

Behavior 6: Perseverative Language: Any act of repeating a saying or phrase. Each act will be scored as one occurrence, with occurrences being separated by a four second pause in the behavior. Data will be taken as 5 minute partial interval monthly.

Behavior 7: Physical Aggression: Any act or attempt to hit or kick another person. Each occurrence is scored. Data for physical aggression is taken as rate per half hour.

Behavior 8: Picking: Any act or attempt to peel material from shoes, and/or scrape finger or object at tooth. Data for picking is taken as partial interval per five minutes.

Behavior 9: Self Injurious Behavior: Any act or attempt to hit self (hand to bottom) or head bang (hit head against objects). Each act or attempt will be scored as an occurrence. Data for self injurious behavior is taken as rate per half hour.

Behavior 10: Verbal Aggression: Any act of stating "I hate you" or "Stupid, stupid head." Each act will be scored as an occurrence. Data for verbal aggression will be taken as rate per half hour.

Endrew receives one-to-one direct teaching to help minimize occurrences of target behaviors. If the presence of eloping or climbing is not redirectable,

Endrew requires two staff to help escort him for his safety and the safety of others. Differential reinforcement, redirection, functional alternatives, and blocking are used to help Endrew successfully access his education in a least restrictive environment.

Current Placement Profile:

Endrew is currently in a classroom with peers, ages 11 to 17. The classroom team consists of 1 Program Coordinator (BCBA), 1 senior assistant teacher, 4 assistant teachers, Occupational Therapist, Speech/Language Pathologist, and Clinical Director (BCBA). Endrew's case manager is responsible for monitoring his progress in his academic programs every three days and graphing and monitoring his behavior data on a daily basis. The team meets regularly to discuss progress and to develop a coordinated plan to address and accomplish IEP goals.

Endrew is a student at the Alta Vista Center for Autism, which utilizes the principles of Applied Behavior Analysis (ABA). The mission of the Alta Vista Center is to educate children with autism by emphasizing the acquisition of meaningful skills to promote independence in the school and community settings as well as improve and enrich social interactions and social learning. Each student has an individualized curriculum that focuses on functional life skills and functional and appropriate grade level academics. Throughout the day, the classroom provides 1:1 and 2:1student to staff ratio instruction using ABA methodology. When behaviors that interfere with learning are observed, behavioral assessments are conducted and the data are used to develop intervention strategies that reduce these behaviors and increase opportunities for learning. The Alta Vista Center provides Speech/Language Pathologist and Occupational Therapy consultation as a supplementary aid and accommodation as prescribed by IEP approved hours.

Classroom staff members collect data on each student's IEP objectives to assess progress and to modify teaching and treatment strategies. As students acquire the targeted instructional skills necessary to participate in group settings, group activities designed to promote the generalization of these skills are provided. The classroom is designed to teach and facilitate the behavioral, functional, social and academic skills needed for successful transition into less restrictive educational environments as assessed by each student's demonstrated needs.

-DRAFT-

Endrew [redacted]		[redacted]	11/16/2010
Student Name	Student ID	DOB	Date of Meeting

Goals and Objectives

With the exception of the Initial IEP, the committee must review and document progress toward completion of the child's/student's previous goals and objectives prior to the development of new goals and objectives.

Adaptive Behavior Goal 1: Reduce maladaptive behaviors (climbing, crying, dropping, eloping, loud vocalizations, perseverative language, physical aggression, picking, self injurious behavior, and verbal aggression).

Short-term Instructional Objectives/Benchmarks	Criteria and Evaluation Procedures to be Used *(i.e., formal/informal measures, observations, recorded data, work samples, etc.)*	Schedule for Achievement of Objective		Progress (Not Evident, Not Yet Proficient, Proficient or Advanced)	
		Beginning Date	Target Completion Date	Date	Proficiency
(#1) Given an individualized behavior plan, Endrew will decrease rate of climbing. **Baseline:** 8/16/2010-9/15/2010 average rate per half hour of .08	Daily data collected on the rate of behavior. Criteria: Reduction of 25% per quarter from baseline.	11/16/2010	11/15/2011		
(#2) Given an individualized behavior plan, Endrew will decrease average rate of crying episodes. **Baseline:** 8/17/2010-9/15/2010 average occurrence in 2.4% of the day.	Daily data collected on the duration of the behavior. Criteria: Reduction of 25% per quarter from baseline.	11/16/2010	11/15/2011		
(#3) Given an individualized behavior plan, Endrew will decrease rate of dropping. **Baseline:** 8/16/2010-9/15/2010 average rate per half hour of .4.	Daily data collected on the rate of behavior. Criteria: Reduction of 25% per quarter from baseline.	11/16/2010	11/15/2011		
(#4) Given an individualized behavior plan, Endrew will decrease rate of eloping. **Baseline:** 8/16/2010-9/15/2010 average rate per half hour of .2.	Daily data collected on the rate of behavior. Criteria: Reduction of 25% per quarter from baseline.	11/16/2010	11/15/2011		

Not Evident: Skill/behavior rarely or never is demonstrated, even with sufficient prompts or cues.
Not Yet Proficient: Skill/behavior is demonstrated inconsistently, even with frequent prompts or cues.
Proficient: Skill/behavior is demonstrated consistently, over time with only occasional prompts or cues.
Advanced: Skill/behavior is generalized (demonstrated in different settings or environments) and transferable (adapted to different contexts) with no prompts or cues.

-DRAFT-

Endrew [redacted]		[redacted]	11/16/2010
Student Name	Student ID	DOB	Date of Meeting

Short-term Instructional Objectives/Benchmarks	Criteria and Evaluation Procedures to be Used *(i.e., formal/informal measures, observations, recorded data, work samples, etc.)*	Schedule for Achievement of Objective		Progress (Not Evident, Not Yet Proficient, Proficient or Advanced)	
		Beginning Date	Target Completion Date	Date	Proficiency
(#10) Given an individualized behavior plan, Endrew will decrease rate of verbal aggression. **Baseline:** 8/16/2010-9/15/2010 average rate per half hour of 0.1.	Daily data collected on the rate of behavior. Criteria: Reduction of 25% per quarter from baseline.	11/16/2010	11/15/2011		

Not Evident: Skill/behavior rarely or never is demonstrated, even with sufficient prompts or cues.
Not Yet Proficient: Skill/behavior is demonstrated inconsistently, even with frequent prompts or cues.
Proficient: Skill/behavior is demonstrated consistently, over time with only occasional prompts or cues.
Advanced: Skill/behavior is generalized (demonstrated in different settings or environments) and transferable (adapted to different contexts) with no prompts or cues.

-DRAFT-

Endrew [redacted]		[redacted]	11/16/2010
Student Name	Student ID	DOB	Date of Meeting

Short-term Instructional Objectives/Benchmarks	Criteria and Evaluation Procedures to be Used *(i.e., formal/ informal measures, observations, recorded data, work samples, etc.)*	Schedule for Achievement of Objective		Progress (Not Evident, Not Yet Proficient, Proficient or Advanced)	
		Beginning Date	Target Completion Date	Date	Proficiency
(#4) Given systematic pairing to condition, Endrew will increase items and activities that function as reinforcers. **Baseline:** 8/16/2010-9/15/2010 Endrew engages in limited reinforces including computer games and digging rocks.	Daily data collection on per opportunities measure. Criteria: Mastered at average rate of 0.4 per half hour across 3 consecutive days. Annual goal of mastery of 8 conditions.	11/16/2010	11/15/2011		
(#5) Given systematic teaching based upon a cognitive behavior therapy program consisting of systematic desensitization and inhibition training, Endrew will increase tolerance of delayed access. **Baseline:** 8/16/2010-9/8/2010 Endrew is able to wait for the computer for an average of 16 seconds before the occurrence of target behaviors.	Daily data collection on per opportunities measure. Criteria: Mastered at 90% accuracy across 3 consecutive days. Annual goal of 4 mastery of conditions for 2 minutes.	11/16/2010	11/15/2011		
(#6) Given systematic teaching based upon a cognitive behavior therapy program consisting of systematic desensitization and inhibition training, Endrew will increase tolerance of denied access. **Baseline:** 8/16/2010-9/8/2010 8/16/2010-9/15/2010 Skill not demonstrated.	Daily data collection on per opportunities measure. Criteria: Mastered at 90% accuracy across 3 consecutive days. Annual goal of 4 mastery of conditions.	11/16/2010	11/15/2011		

Not Evident: Skill/behavior rarely or never is demonstrated, even with sufficient prompts or cues.
Not Yet Proficient: Skill/behavior is demonstrated inconsistently, even with frequent prompts or cues.
Proficient: Skill/behavior is demonstrated consistently, over time with only occasional prompts or cues.
Advanced: Skill/behavior is generalized (demonstrated in different settings or environments) and transferable (adapted to different contexts) with no prompts or cues.

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Endrew [redacted]		[redacted]	11/16/2010
Student Name	Student ID	DOB	Date of Meeting

Goals and Objectives

With the exception of the Initial IEP, the committee must review and document progress toward completion of the child's/student's previous goals and objectives prior to the development of new goals and objectives.

Cognition Goal 1: Increase participation in group instruction, oral directions, following a schedule, telling a story and working memory.

Short-term Instructional Objectives/Benchmarks	Criteria and Evaluation Procedures to be Used *(i.e., formal/informal measures, observations, recorded data, work samples, etc.)*	Schedule for Achievement of Objective		Progress (Not Evident, Not Yet Proficient, Proficient or Advanced)	
		Beginning Date	Target Completion Date	Date	Proficiency
(#1) Given a schedule book, analogue clock and systematic teaching, Endrew will follow a daily schedule independently. **Baseline:** 8/16/2010-9/15/2010 Skill not demonstrated.	Daily data collection on per opportunities measure. Criteria: mastered at 90% accuracy across 3 consecutive days. Annual goal of mastery of 4/4 steps in transition task to break, 5/5 steps in transition task to task and 6/6 steps in transition break to task.	11/16/2010	11/15/2011		
(#2) Given a novel visual or textual prompt, Endrew will describe the event or picture using 3 complete sentences. **Baseline:** 8/24/2010-9/7/2010 Endrew is unable to write a complete sentence. Average length of written narrative 1.1 words.	Daily data collection on per opportunities measure. Criteria: mastered at 80% accuracy across 3 conseutive days. Annual goal of 3 sentences.	11/16/2010	11/15/2011		
(#3) Given a daily photo journal and question of the day, Endrew will improve his working memory. **Baseline:** 8/16/2010-9/15/2010 Skill not demonstrated.	Daily data collection on per opportunities measure. Criteria: mastered at 90% accuracy across 3 consecutive days. Annual goal of mastery of 4 conditions.	11/16/2010	11/15/2011		

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Endrew [redacted]		[redacted]	11/16/2010
Student Name	Student ID	DOB	Date of Meeting

Goals and Objectives

With the exception of the Initial IEP, the committee must review and document progress toward completion of the child's/student's previous goals and objectives prior to the development of new goals and objectives.

Communication Goal 2: Social communication

Short-term Instructional Objectives/Benchmarks	Criteria and Evaluation Procedures to be Used *(i.e., formal/informal measures, observations, recorded data, work samples, etc.)*	Schedule for Achievement: of Objective		Progress (Not Evident, Not Yet Proficient, Proficient or Advanced)	
		Beginning Date	Target Completion Date	Date	Proficiency
(#1 Given systematic teaching related to preferred topics and a communication partner, Endrew will increase his conversation exchanges by 2 per quarter. **Baseline:** 8/16/2010-9/15/2010 Endrew is able to make 1 related comment to a request he has initiated and engage in 1 reciprocal conversation exchange.	Daily data collection on per opportunities measure. Criteria: mastery at 80% accuracy across 3 consecutive days. Annual goal to increase by 2 converesaton exchanges per quarter.	11/16/2010	11/15/2011		
(#2) Given systematic teaching and incidental teaching opportunities, Endrew will initiate interaction with teachers and peers. **Baseline:** 8/16/2010-9/15/2010 Skill not demonstrated.	Daily data collection on per opportunities measure. Criteria: mastery at 80% accuracy across 3 days. Annual goal of mastery of 4 conditions.	11/16/2010	11/15/2011		
(#3) Given social routines and interactive play, Endrew will increase the rate of interactive activities requested. **Baseline:** 8/16/2010-9/15/2010 Skill not demonstrated.	Daily data collected on the rate of behavior. Criteria: Increase by 15% per quarter from baseline.	11/16/2010	11/15/2011		

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Endrew [redacted]		[redacted]	11/16/2010
Student Name	Student ID	DOB	Date of Meeting

Goals and Objectives

With the exception of the Initial IEP, the committee must review and document progress toward completion of the child's/student's previous goals and objectives prior to the development of new goals and objectives.

Emotion Goal 1: Identify and use coping skills, identify emotions, and use adults to regulate emotional state.

Short-term Instructional Objectives/Benchmarks	Criteria and Evaluation Procedures to be Used *(i.e., formal/informal measures, observations, recorded data, work samples, etc.)*	Schedule for Achievement of Objective		Progress (Not Evident, Not Yet Proficient, Proficient or Advanced)	
		Beginning Date	Target Completion Date	Date	Proficiency
(#1) Given systematic teaching using cognitive behavior therapy and incidental teaching opportunities, Endrew will identify and use coping skills **Baseline:** 8/16/2010-9/15/2010 Skill not demonstrated.	Daily data collection on per opportunities measure. Criteria: mastery at 80% accuracy across 3 days. Annual goal of mastery of 4 conditions.	11/16/2010	11/15/2011		
(#2) Given systematic teaching and incidental teaching opportunities, Endrew will identify emotions in himself and others. **Baseline:** 8/16/2010-9/15/2010 Endrew is able to identify happy and sad in contrived situations.	Daily data collection on per opportunities measure. Criteria: mastery at 80% accuracy across 3 days. Annual goal of mastery of 4 conditions.	11/16/2010	11/15/2011		
(#3) Given incidental teaching opportunities, Endrew will use adults to regulate his emotional state. **Baseline:** 8/16/2010-9/15/2010 Skill not demonstrated.	Daily data collection on per opportunities measure. Criteria: mastery at 80% accuracy across 3 days. Annual goal of mastery of 4 skills: reference, increase proximity and accept verbal and physical comfort.	11/16/2010	11/15/2011		

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Endrew [redacted]		[redacted]	11/16/2010
Student Name	Student ID	DOB	Date of Meeting

Goals and Objectives

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Math Skills Goal 1: basic math concepts and operations

Short-term Instructional Objectives/Benchmarks	Criteria and Evaluation Procedures to be Used *(i.e., formal/informal measures, observations, recorded data, work samples, etc.)*	Schedule for Achievement of Objective		Progress (Not Evident, Not Yet Proficient, Proficient or Advanced)	
		Beginning Date	Target Completion Date	Date	Proficiency
(#1) Given systematic teaching and fluency practice, Endrew will learn multiplication facts 6-12. **Baseline:** 8/16/2010-9/15/2010 Endrew demonstrated multiplication facts (0-3)*(0-12) with 95% accuracy.	Daily data collection on per opportunities measure. Criteria: mastery at 80% accuracy across 3 consecutive days. Annual goal of (0-12)*(0-12).	11/16/2010	11/15/2011		
(#2) Given systematic teaching, Endrew will complete word problems using addition, subtraction and multiplication. **Baseline:** 8/16/2010-9/9/2010 Endrew is able to identify which sign to use between addition and subtraction with 79% accuracy.	Daily data collection on per opportunities measure. Criteria: mastery at 80% accuracy across 3 consecutive days. Annual goal of mastery of 4 conditions.	11/16/2010	11/15/2011		

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Endrew [redacted]		[redacted]	11/16/2010
Student Name	Student ID	DOB	Date of Meeting

Short-term Instructional Objectives/Benchmarks	Criteria and Evaluation Procedures to be Used *(i.e., formal/informal measures, observations, recorded data, work samples, etc.)*	Schedule for Achievement of Objective		Progress (Not Evident, Not Yet Proficient, Proficient or Advanced)	
		Beginning Date	Target Completion Date	Date	Proficiency
(#4) Given systematic teaching and incidental teaching opportunities, Endrew will identify the time on varied analogue clocks to the minute. **Baseline:** 8/16/2010-9/15/2010 Endrew is able to identify time using analogue clocks to the hour and half hour in discrimination with 79% accuracy.	Daily data collection on per opportunities measure. Criteria: mastered at 80% accuracy across 3 consecutive days. Annual goal: master to 1 minute.	11/16/2010	11/15/2011		

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Endrew [redacted]		[redacted]	11/16/2010
Student Name	Student ID	DOB	Date of Meeting

Goals and Objectives

With the exception of the Initial IEP, the committee must review and document progress toward completion of the child's/student's previous goals and objectives prior to the development of new goals and objectives.

Recreation and Leisure Goal 1: Follow leisure schedule and increase leisure repertoire.

Short-term Instructional Objectives/Benchmarks	Criteria and Evaluation Procedures to be Used *(i.e., formal/informal measures, observations, recorded data, work samples, etc.)*	Schedule for Achievement of Objective		Progress (Not Evident, Not Yet Proficient, Proficient or Advanced)	
		Beginning Date	Target Completion Date	Date	Proficiency
(#1) Given a visual schedule, Endrew will follow a leisure schedule. **Baseline:** 8/16/2010-9/15/2010 Skill not demonstrated	Daily data collection on per opportunities measure. Criteria: mastery at 90% accuracy across 3 consecutive days. Mastery of 2 activities per quarter.	11/16/2010	11/15/2011		
(#2) Given incidental teaching opportunities, Endrew will increase his leisure skills repertoire. **Baseline:** 8/16/2010-9/15/2010 Endrew is able to play computer games as a leisure skill.	Daily data collection on per opportunities measure. Criteria: mastery at 80% accuracy across 3 days. Annual goal of mastery of 2 activities per quarter.	11/16/2010	11/15/2011		

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Endrew [redacted]		[redacted]	11/16/2010
Student Name	Student ID	DOB	Date of Meeting

Short-term Instructional Objectives/Benchmarks	Criteria and Evaluation Procedures to be Used *(i.e., formal/informal measures, observations, recorded data, work samples, etc.)*	Schedule for Achievement of Objective		Progress (Not Evident, Not Yet Proficient, Proficient or Advanced)	
		Beginning Date	Target Completion Date	Date	Proficiency
(#5) Given a group lesson, Endrew will engage in the following skills: raising hand and answering questions. **Baseline:** 8/16/2010-9/15/2010 Skill not demonstrated.	Daily data collection on per opportunities measure. Criteria: mastered at 80% accuracy across 3 consecutive days. Annual goal of mastery of 2 conditions.	11/16/2010	11/15/2011		
(#6) Given systematic teaching based upon a cognitive behavior therapy program consisting of systematic desensitization and inhibition training, Endrew will use public restrooms while on school outings independently. **Baseline:** 6/15/2010-9/15/2010 Endrew has used the restroom on 1/3 outings.	Daily data collection on per opportunities measure. Criteria: 4 outings per year without target behaviors.	11/16/2010	11/15/2011		

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Endrew [redacted]		[redacted]	11/16/2010
Student Name	Student ID	DOB	Date of Meeting

Goals and Objectives

With the exception of the Initial IEP, the committee must review and document progress toward completion of the child's/student's previous goals and objectives prior to the development of new goals and objectives.

Speech and Language Development Goal 1: Expressive Language

Short-term Instructional Objectives/Benchmarks	Criteria and Evaluation Procedures to be Used *(i.e., formal/informal measures, observations, recorded data, work samples, etc.)*	Schedule for Achievement of Objective		Progress (Not Evident, Not Yet Proficient, Proficient or Advanced)	
		Beginning Date	Target Completion Date	Date	Proficiency
(#1) Given systematic teaching of letter sounds and consultative and direct service hours with a speech language pathologist Endrew will correctly pronounce /l/ in all positions at the sentence level and /th/ in all positions in spontaneous speech. **Baseline:** 8/16/2010-9/16/2010 Endrew is unable to pronounce the /l/ or /th/ sound in spontaneous speech.	Daily data collection on per opportunities measure. Criteria: mastered at 90% accuracy across 3 consecutive days. Annual goal of mastery of 2 conditions.	11/16/2010	11/15/2011		
(#2) Given systematic teaching, Endrew will improve the grammatical complexity of his oral and written language. **Baseline:** 8/16/2010-9/16/2010 Endrew demonstrates deficits in pronoun use, noun plurals and verb conjugation.	Daily data collection on per opportunities measure. Criteria:mastered at 80% accuracy across 3 consecutive days. Annual goal of mastery of 4 conditions.	11/16/2010	11/15/2011		

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EnFa IEP Outline Draft
Meeting with family 7/23/10

Goals	Notes
Adaptive Behavior Goal 1- decrease maladaptive behaviors	
1. Climbing	
2. Crying	
3. Dropping	
4. Eloping	
5. Loud vocalizations	Partial interval, include loud words and loud nonwords
6. Perseverative language a. Monitor by monthly language sample and rate	
7. Physical Aggression	
8. Picking	Shoes, teeth and skin at home Shoes only at school Rocks on playground?
9. Self Injurious Behavior	
10. Verbal aggression	
Adaptive Behavior Goal 2- increase adaptive behaviors	
1. Cognitive Behavioral Therapy a. Anxiety: systematic desensitization b. Impulsivity: inhibition training	1
2. Functional Communication Training a. Identify compulsions b. Review ABCs of behavior data to teach FCT in relationship to target behaviors	1
3. Increase positive affect a. Occurrence b. Duration	2
4. Increase reinforcers	2
5. Tolerance of delayed and denied access a. Delayed access under 4 conditions for up to 24 hours b. Denied access under 4 conditions	1
Activities of Daily Living Goal 1	
1. Hand washing	1
2. Hygiene routine a. Brush teeth b. Wash face	1

EnFa IEP Outline Draft
Meeting with family 7/23/10

3. Increase appropriate eating a. Slowing eating b. Silverware use	1
4. Restroom use	2
Cognition Goal 1	
1. Choices	2
2. Group instruction a. Raise hand b. Answer question	2
3. Oral directions	2
4. Tell a story	1
5. Schedule a. Using calendar and digital clock b. Independently follow a time based schedule	1
6. Working memory	1 Question of the day
Communication Goal 1- requesting	
1. Increase rate and items/activities requested	1
2. Increase the quality of social relatedness and communication when requesting	2- prerequisite: increase other social goals
Communication Goal 2- social interaction and social communication	
1. Conversation	2: prerequisite: social routines, mands for social interaction?
2. Increase rate of interactive activities requested	1 define criteria
3. Nonverbal gestures and facial expressions	1
Emotion Goal 1	
1. Identify and use coping skills	2: prerequisite: begin CBT program, implement this goal after mastered/mastering first condition of CBT program
2. Identify emotions	2
3. Use adults to regulate emotional state a. Reference b. Increase proximity c. Accept verbal and physical comfort	1
Literacy and Reading Goal 1	
1. Increase length and complexity of written narrative a. Daily journal b. Email c. Reading comprehension	1 emailing

EnFa IEP Outline Draft
Meeting with family 7/23/10

2. Reading comprehension questions a. Based upon nonfiction b. Increase from grade level 1.4 to 2.4 (1 grade level from baseline) c. Multiple choice, fill in the blank, complete sentences	2
3. Written instructions	2
Math Skills Goal 1- basic math concepts and operations	
1. Multiplication a. Memorize math facts b. Use functionally	2
2. Word problems a. Identify math operation to use b. Addition, subtraction, multiplication	1
Math Skills Goal 2- money and time	
1. Money a. Count varied coins and bills up to $5.00	1
2. Time a. Associative time concepts: soon, later, AM, PM b. Identify time to 1 minute using an analogue clock	2
Motor Skills Goal 1	
1. Handwriting a. Personal information b. Academic work? c. Systematic teaching: OT assessment	2: prerequisite- OT assessment
2. Increase P.E. and outdoor activities a. Sports b. Outdoor activities such as rock climbing	2: plan with IT
3. Typing a. Academic work?	2: WPM and accuracy, look for good program to measure and BL
Recreation and Leisure Goal 1	
1. Follow leisure schedule	2
2. Increase leisure repertoire	2
School and Community Goal 1	
1. 4 outings per year	NA
2. Check out library book	2
3. School routine	1 getting lunch box
4. What is difficult for the family that we can work on?	Family: home depot, street safety, ,walks, staying with adult 1- Street safety
Social Skills Goal 1- time with peers and interactive leisure skills	

EnFa IEP Outline Draft
Meeting with family 7/23/10

1. Interactive activities with adults	1- Diane
2. Interactive activities with peers	2 Diane
3. Social routines a. Shared enjoyment b. Joint attention c. Referencing	1 Diane
Speech and Language Development Goal 1	
1. Articulation a. SLP assessment and hours?	Yes for SLP assessment
2. Attributes	
3. Prepositions	
4. Pronouns	Dependent on SLP assessment
5. Prosody and tone	
6. WH questions a. Asking and answering in functional use b. What c. Who d. When e. Where f. Why g. How	

Firefly Autism
Inspiring Bright Futures

Firefly Autism House

Behavior Reduction and Skill Replacement Program

Name: Endrew [redacted]

Date Implemented:
Date Discontinued:

Objective: To obtain a reduction of inappropriate behaviors (climbing, crying, dropping, eloping, loud vocalizations, perseverative language, physical aggression, picking, self injurious behavior, and verbal aggression). Skill replacement procedures to be implemented include differential reinforcement of appropriate behaviors, functional communication training, increased tolerance to feared and aversive conditions, increase tolerance to delayed and denied access, increase positive affect, increase items and activities which function as reinforcers, and increase use of adults to assist in regulating emotional state.

Target Behavior:

Behavior 1: Climbing: Any act or attempt to lift self off floor onto furniture and or people. Score occurrence separated by Endrew's feet on floor.

Behavior 2: Crying: Any act resulting in tears.

Behavior 3: Dropping: Any act or attempt in which Endrew falls/removes self from furniture, landing on knees and or bottom. Score each occurrence separated by Endrew's standing with feet on floor.

Behavior 4: Eloping: Any act or attempt to leave designated area either by walking, running or rolling across floor. Score each occurrence separated by movement toward designated area.

Behavior 5: Loud Vocalizations: Any act of screaming or yelling words or sounds above a conversational volume. Score each occurrence.

Behavior 6: Perseverative Language: Utterances repeated more than one time (following the acknowledgement of first utterance) relating to the same topic, request or comment. Score as partial interval occurrence per 5 minute interval.

Behavior 7: Physical Aggression: Any act or attempt to hit or kick other person. Score each occurrence.

Behavior 8: Picking: Any act or attempt to peel material from shoes, nose and/or scrape finger or object at tooth.

Behavior 9: Self Injurious Behavior: Any act or attempt to hit self (hand to bottom) or head bang (hit head against objects/surfaces).

EXHIBIT
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Behavior 10: Verbal Aggression: Any act of stating "I hate you" or "Stupid, stupid head"

Assessment/Functional Analysis:

	Date Completed
Behavioral observation (anecdotal report)	5/12/10-7/26/10
ABC Data Collection	7/26/10-8/1/10

Results suggest that climbing, crying, dropping, eloping, and physical aggression function to access preferred items and activities. Dropping, eloping, and physical aggression also secondarily function to avoid task demands and anxiety provoking situations such as denied access to preferred activities. Crying, dropping, loud vocalizations, picking, self injurious behavior and verbal aggression may also function to gain attention. Crying, loud vocalizations, perseverative language, picking and self injurious behavior appear to also function as automatic reinforcement. Picking may occur when Drew is not engaged in the current activity. He also engages in picking at teeth when he has a loose tooth and will pick at the tooth until it falls out. He also engages in crying, loud vocalizations, perseverative language and self injurious behavior when denied access to completing rituals and scripts. It appears that these behaviors may serve to assist in self-soothing.

Baseline:

Date Completed: 8/16/2010-9/15/2010	Average Rate per Half Hour Interval
Climbing	0.08
Dropping	0.4
Eloping	0.2
Physical Aggression	0.01
Self Injurious Behavior	0.03
Verbal Aggression	0.1
	Average Partial Interval Occurrence (5 minute intervals)
Loud Vocalizations	27%
Perseverative Language	9%
Picking	5.9%
	Average Percentage of Day
Crying (10/27/10-11/11/10)	1.8%

Developmental/Behavioral/Medical Strengths and Barriers:

- Anxious behavior around possible mistakes, lost objects, denied access
- Demonstrates some repetitive behavior that may be compulsive in nature
- Poor impulse control
- Low motivation for social interaction
- Difficulty in accepting comfort when upset
- Limited repertoire of social interactions
- Follows some rule governed behavior
- Successful at following a schedule

- Math facts are an academic strength

Previous Procedures:

- Timed breaks

Procedures for Environmental Accommodations and Skill Acquisition (Proactive Plan)

Teacher Actions and Classroom and Environmental Accommodations:
Student Behavior: Endrew will receive differential reinforcement for completing work
Procedure: Differential Reinforcement and token economy
Teacher Action: Endrew will gain access to a reinforcer based on the absence of target behaviors. He will earn tokens on a variable ratio schedule for completing skill acquisition programs correctly without engaging in target behaviors. His token board has 8 tokens on it. He is able to choose what the tokens look like and make new tokens. His token boards have been of pictures of teletubbies and the backyardigans.

Procedure: Transitions based upon task completion
Teacher Action: Given the end of a task/level, Endrew will receive reinforcement such as access to preferred activities or attention

Procedure: Inferential/attunement statements
Teacher Action: Teachers will make comments inferring what Endrew may be feeling or needing to assist him in identifying his own needs. For example "It seems like you might be getting hungry".

Skill Acquisition:
Student Behavior: Endrew will use Functional communication and replacement language to request items, activities, help and protests.
Procedure: Differential reinforcement, prompt replacement language through functional communication training (FCT)
Teacher Action: Given a situation in which Endrew is seeking an item, activities, help or protesting an activity or item, teacher will model/prompt a request such as "I need to find the piece."

Student Behavior: Endrew will increase his tolerance to feared and aversive items, activities and conditions such as flies, dogs, spilling liquids and losing at a game
Procedure: Cognitive behavior therapy, systematic desensitization, shaping and reinforcement.
Teacher Action: Teachers will systematically present feared and aversive items, activities and conditions with increasing demands to tolerate their presence using reinforcement and shaping procedures.

Student Behavior: Endrew will increase his tolerance to delayed and denied access to preferred activities and items.
Procedure: Cognitive behavior therapy, systematic desensitization, positive self talk
Teacher Action: Teachers will systematically delay and deny access to preferred activities and items following systematic and specified teaching steps.

Student Behavior: Endrew will increase duration of positive affect.
Procedure: Sensory social and joint attention/activity routines, partial interval data on smiling and laughing

- Selective attention: teachers will provide attention only in the form of prompts to return to task and shaping back to task
- Redirection: teachers will prompt to return to task
- Shaping: teachers will differentially reinforce subsequent approximations

Student Behavior: Eloping
Procedure: block, redirection/functional communication, shaping, inferential/attunement statements
Teacher Action:

- Block: teachers will block Endrew from eloping
- Redirection: teachers will verbally prompt/provide replacement language such as "I want to find the piece"
- Shaping: teachers will differentially reinforce subsequent approximations
- Inferential/Attunement statements: teachers will make comments inferring what Endrew may be feeling/needing to assist him in identifying his own needs, for example "It seems like you want to go find something."

Student Behavior: Loud Vocalizations
Procedure: selective attention, redirection, shaping
Teacher Action:

- Selective attention: teachers will provide attention only in the form of prompts to return to task and shaping back to task
- Redirection: teachers will prompt to return to task
- Shaping: teachers will differentially reinforce subsequent approximations

Student Behavior: Perseverative Language
Procedure: Selective attention, tolerating delayed and denied access.
Teacher Action: Acknowledge first request, use first, then statements and visuals for delayed access. Provide selective attention to Endrew when he is not engaging in Perseverative language.

Student Behavior: Physical Aggression
Procedure: block, redirection/functional communication, shaping, inferential/attunement statements
Teacher Action:

- Block: teachers will block Endrew from engaging in physical aggression
- Redirection: teachers will verbally prompt/provide replacement language such as "I want to find the piece"
- Shaping: teachers will differentially reinforce subsequent approximations
- Inferential/Attunement statements: teachers will make comments inferring what Endrew may be feeling/needing to assist him in identifying his own needs, for example "It seems like you want to go find something."

Student Behavior: Picking
Procedure: selective attention, redirection, shaping
Teacher Action:

- Selective attention: teachers will provide attention only in the form of prompts to return to task and shaping back to task
- Redirection: teachers will prompt to return to task
- Shaping: teachers will differentially reinforce subsequent approximations

Student Behavior: Self Injurious Behavior
Procedure: block, redirection/functional communication, shaping, inferential/attunement statements
Teacher Action:

- Block: teachers will block Endrew from engaging in self injurious behavior
- Redirection: teachers will verbally prompt/provide replacement language such as "I want to find the piece"
- Shaping: teachers will differentially reinforce subsequent approximations
- Inferential/Attunement statements: teachers will make comments inferring what Endrew may be feeling/needing to assist him in identifying his own needs, for example "It seems like you want to go find something."

Student Behavior: Verbal Aggression
Procedure: selective attention, redirection, shaping
Teacher Action:

- Selective attention: teachers will provide attention only in the form of prompts to return to task and shaping back to task
- Redirection: teachers will prompt to return to task
- Shaping: teachers will differentially reinforce subsequent approximations

Data Collection and Evaluation:

Behavior	Data Collection Method	Daily Data Summary
Climbing	Frequency	Average rate per 30 minute interval
Crying	Duration	Percentage per day
Dropping	Frequency	Average rate per 30 minute interval
Eloping	Frequency	Average rate per 30 minute interval
Loud Vocalizations	Partial Interval Recording per 5 minute interval	Percentage of intervals with loud vocalization occurrence
Perseverative Language	Partial Interval Recording per 5 minute interval	Percentage of intervals with perseverative language occurrence
Physical Aggression	Frequency	Average rate per 30 minute interval
Picking	Partial Interval Recording per 5 minute interval	Percentage of intervals with picking occurrence
Self Injurious Behavior	Frequency	Average rate per 30 minute interval
Verbal Aggression	Frequency	Average rate per 30 minute interval

Crisis Management:
When Endrew displays behavior that may harm himself or others or result in significant property damage, safety management techniques will be used as a temporary safety precaution. These techniques involve physical restraint to maintain the safety of Endrew and others or to prevent property damage. All adults who work with Endrew have been trained in physical management techniques. Please refer to safety control procedures plan for details.

Crisis Management Documentation:
When a crisis management technique is used, the date, time, duration and the adults involved will be documented. If any injuries occur to Endrew or to the adults working with him, they will also be noted.

Endrew's family will be notified by written communication the same day crisis management techniques are implemented.

Mara Stackhouse
Program Coordinator CAB

Carrie Scott
Clinical Director

Endrew [redacted]

Firefly Autism House
Behavior Intervention Plan (BIP)
Approval Sheet
(Modified environment, redirections, functional communication training, blocking, shaping, and inferential/attunement statements, selective attention)

I, Jennifer [redacted], (parent/guardian) understand the procedures described in this behavior reduction plan and agree to the implementation of this plan. I understand that this plan will be systematically evaluated to determine its effectiveness and those changes may be made to this plan if the intervention is found to be ineffective. I understand that I can contact the Program Coordinator, Maura Stack-Oden, or Clinical Director, Carrie Scott at 303-759-1192 if I have any questions about this plan or would like to withdraw my consent for the procedure(s).

[redacted] 7-20-11

Parent Signature Date

7-20-11

Witness Date

RECORD AND BRIEFS

Supreme Court, U.S.
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No. 15-827

IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF FOR PETITIONER

Jeffrey L. Fisher
David T. Goldberg
Pamela S. Karlan
SUPREME COURT
LITIGATION CLINIC
William S. Koski
YOUTH AND EDUCATION
LAW PROJECT
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, CA 94305

Jack D. Robinson
Counsel of Record
SPIES, POWERS &
ROBINSON, P.C.
950 South Cherry Street
Suite 700
Denver, CO 80246
(303) 830-7090
robinson@sprlaw.net

Brian Wolfman
Wyatt G. Sassman
GEORGETOWN LAW
APPELLATE COURTS
IMMERSION CLINIC
600 New Jersey Ave., NW
Washington, DC 20001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*?

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BRIEF FOR PETITIONER

Petitioner Endrew F. respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, Pet. App. 1a, is published at 798 F.3d 1329. The opinion of the United States District Court for the District of Colorado, Pet. App. 27a, is unpublished but is available at 2014 WL 4548439. The opinion of the State of Colorado Office of Administrative Courts, Pet. App. 59a, is also unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on August 25, 2015. Pet. App. 1a. Petitioner's request for rehearing and rehearing en banc was denied on September 24, 2015. Pet. App. 86a. The petition for a writ of certiorari was filed on December 22, 2015, and granted on September 29, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Individuals with Disabilities Education Act (IDEA or "the Act"), 20 U.S.C. § 1400 *et seq.*, requires that public schools receiving federal funds for special education services provide each child with a disability a "free appropriate public education." 20 U.S.C. §§ 1401(9), 1412(a)(1)(A). This free and appropriate public education must be "provided in conformity with the individualized education

program," or IEP, "required under" the IDEA. *Id.* § 1401(9)(D).

Other relevant provisions of the IDEA are included in the joint appendix, J.A. 21-111.

STATEMENT OF THE CASE

A. Legal background

1. Several decades ago, concerned that children with disabilities often were not receiving proper education in public schools, Congress conducted an investigation. It found that such children sometimes "did not receive appropriate educational services" while others "were excluded entirely from the public school system and from being educated with their peers." 20 U.S.C. § 1400(c)(2)(A), (B). Still other children with disabilities "were simply 'warehoused' in special classes or were neglectfully shepherded through the system until they were old enough to drop out." *Honig v. Doe*, 484 U.S. 305, 309 (1988) (quoting H.R. Rep. No. 94-332, at 2 (1975)); *see also Bd. of Educ. v. Rowley*, 458 U.S. 176, 179 (1982); Edwin W. Martin et al., *The Legislative and Litigation History of Special Education*, 6 Special Educ. Students Disabilities 25, 26-28 (1996).

These findings gave reason for alarm. Their "long range implications" were that "public agencies and taxpayers w[ould] spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle." S. Rep. No. 94-168, at 9 (1975); *see also Plyler v. Doe*, 457 U.S. 202, 221-22 (1982) (not receiving an education imposes an "inestimable toll" on society as well as "the social, economic, intellectual, and psychological wellbeing of the

individual."). Yet "[w]ith proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society." S. Rep. No. 94-168, at 9.

To address this situation, Congress in 1975 passed the Education for All Handicapped Children Act – now known as the Individuals With Disabilities Education Act, or IDEA. In order to receive federal funding for special education services, the IDEA requires states to "identi[fy], locat[e], and evaluat[e]" students who may need special education. 20 U.S.C. § 1412(a)(3). Once children with disabilities are identified and evaluated, the Act then requires local schools to provide them a "free appropriate public education" (FAPE). *Id.* § 1412(a)(1)(A).

The IDEA defines a FAPE (somewhat circularly) as "special education and related services" that are (A) provided without charge; "(B) meet the standards of the State educational agency; (C) include *an appropriate preschool, elementary school, or secondary school education* in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title." 20 U.S.C. § 1401(9) (emphasis added).

The "centerpiece of the statute's education delivery system for disabled children" is the individualized education program, or IEP. *Honig*, 484 U.S. at 311. Each IEP is created by an "IEP team" comprised of the child's parents or guardian, the child's teachers, and other qualified personnel able to "provide, or supervise the provision of, specially

designed instruction to meet the unique needs of" the child. 20 U.S.C. § 1414(d)(1)(B)(iv)(I). The "IEP must include an assessment of the child's current educational performance, must articulate measurable educational goals, and must specify the nature of the special services that the school will provide." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (citing 20 U.S.C. § 1414(d)(1)(A)).

2. Congress recognized that parents and educators will occasionally disagree on the content of an IEP or whether it has provided their child with a FAPE. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 368 (1985). The IDEA requires that parents be afforded an opportunity to resolve these differences informally, including through mediation. 20 U.S.C. § 1415(d)(2)(E), (e). These informal means often are sufficient to resolve any concerns. *See* Consortium for Appropriate Dispute Resolution in Special Education, *IDEA Dispute Resolution Data Summary for: U.S. and Outlying Areas 2004-05 to 2013-14*, at 4 (Sept. 2015).[1] But when that is not possible, either the school district or the parents may request a "due process hearing" before a hearing officer at a local or state educational agency. 20 U.S.C. § 1415(f).

Most requests for due process hearings are withdrawn, dismissed, or resolved without an actual hearing. *See IDEA Dispute Resolution Data, supra*, at 12. But when the matter goes to a full hearing, the hearing officer decides whether the school district has

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[1] http://www.directionservice.org/cadre/pdf/2013-14%20DR%20Data%20Summary%20US%20&%20Outlying%20Areas.pdf.

met the statute's requirements, principally whether it has provided the student with a FAPE. 20 U.S.C. § 1415(b)(3), (f)(3)(E). Aggrieved parties may appeal to a state or federal court, *id.* § 1415(*i*)(2)(A), which "shall grant such relief as the court determines is appropriate," *id.* § 1415(*i*)(2)(C)(iii). This relief may require placing the child in a regular or a special classroom, awarding "compensatory" special education services to make up for past inadequacies, or reimbursing parents for tuition payments to a private school while the public school was failing to provide a FAPE. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993); *see* 20 U.S.C. § 1412(a)(10)(C)(ii).

3. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), this Court considered the Act's requirement to provide a FAPE. The Court held that schools are not required to "maximize" the potential of children with disabilities. *Id.* at 189-90, 200. At the same time, this Court noted that schools must provide educational services designed to deliver "some educational benefit" and "formulated in accordance with the requirements of the Act." *Id.* at 200, 203-04. As the IDEA then stood, that meant "providing personalized instruction with sufficient support services to permit [a disabled] child to benefit educationally from that instruction" and "to achieve passing marks and advance from grade to grade." *Id.* at 203-04. By affording children with disabilities access to public education, this Court explained, Congress meant to provide enough "substantive" educational benefit "to make such access meaningful." *Id.* at 192; *see also id.* at 202 (school district discharged its duty to provide a FAPE by providing "substantial specialized educational instruction and related services").

4. While the 1975 Act made significant progress in terms of educating children with disabilities, Congress determined after surveying the post-*Rowley* landscape that more needed to be done to "improv[e] the quality of services and transitional results or outcomes obtained by [such] students." S. Rep. No. 104-275, at 14 (1996); *see also* S. Rep. No. 108-185, at 6 (2003). Accordingly, Congress enhanced the IDEA – first in 1997 and again in 2004. *See* Pub. L. No. 105-17, 111 Stat. 37 (1997); Pub. L. No. 108-446, 118 Stat. 2647 (2004).

The purpose of these amendments was "to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education," *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (quoting S. Rep. No. 105-17, at 3 (1997)). In doing so, Congress stopped short of demanding any particular outcomes for students with disabilities. But Congress insisted that school districts abandon the "low expectations" many had been setting for such students and instead strive to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1), (4).

a. The 1997 amendments heightened the requirements for IEPs. For instance, Congress required that IEPs include "measurable" goals as well as descriptions of how those goals should be evaluated, so that progress, or lack thereof, could be ascertained and documented. Pub. L. No. 105-17, § 101, 11 Stat. 37, 84 (1997). Congress required educators to reevaluate students' overall education annually, considering present levels of performance,

educational needs, and "whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general curriculum." Pub. L. No. 105-17, § 101, 111 Stat. 37, 83 (1997).

The 1997 amendments further require that, beginning when a student reaches age 16, the student's IEP include a plan for services to enable students with disabilities to transition to life after high school. Pub. L. No. 105-17, § 101, 111 Stat. 37, 84-85 (1997). They did so to "promote movement from school to post-school activities, including post-secondary education, vocational training, integrated employment, . . . continuing adult education, adult services, independent living, or community participation." Pub. L. No. 105-17, § 101, 111 Stat. 37, 46 (1997).

b. In 2004, Congress further strengthened the IDEA's commitment to high academic expectations for students with disabilities. The 2004 amendments aligned the IDEA's IEP requirements with the challenging academic standards and testing requirements of the Elementary and Secondary Education Act, which generally requires that the States' academic expectations and assessments for students with disabilities be the same as those for students without disabilities. *See generally* 20 U.S.C. § 1412(a)(15), (16).

In addition, IEPs now must include not only the transition services required by the 1997 amendments but also "appropriate measurable postsecondary goals," such as employment, higher education, and

independent living. Pub. L. No. 108-446, § 101, 118 Stat. 2708, 2709 (2004). Along the same lines, the 2004 amendments removed a requirement that IEPs include short-term goals because evidence showed that they "distract from the real purpose of special education, which is to ensure that all children and youth with disabilities achieve high educational outcomes and are prepared to participate fully in the social and economic fabric of their communities." S. Rep. No. 108-185, at 28-29 (2003).

B. Factual and procedural background

1. Petitioner Endrew F. (Drew) was diagnosed with autism at age two. Pet. App. 3a. Autism is a neuro-developmental disorder that can impair social and communicative skills and cause an individual to engage in "repetitive activities, . . . resist[] environmental change or change in daily routines, and [have] unusual responses to sensory experiences." 34 C.F.R. § 300.8(c)(1)(i) (IDEA regulation). In Drew's case, autism impairs his "cognitive functioning, language and reading skills, and his social and adaptive abilities." Pet. App. 3a. Because autism is one of the disabilities categorically covered by the IDEA (and because Colorado, the state where he lives, has elected to accept IDEA funds), Drew is entitled to the Act's protections. *See* 20 U.S.C. § 1401(3)(A).

Drew attended public schools in respondent Douglas County School District from preschool through fourth grade and received an IEP from the school district each year. Pet. App. 3a-4a. Drew's IEP goals included functional goals alongside traditional academic goals. For instance, Drew's third grade IEP stated that "Drew will make and maintain eye contact with peers and adults" and "will indicate the

time shown" on an analog clock. Supp. J.A. 59sa, 67sa. Yet the School District never implemented any plan for helping Drew manage his autism-related behavioral and adaptive struggles.

While in school, therefore, Drew experienced growing behavioral and adaptive difficulties. He had frequent outbursts and suffered from fixations that caused him to disrupt neighboring classrooms and sometimes to crawl over students to get to things, such as a timer. Drew was also gripped by extreme fear of flies and spills, and public restrooms, which made it nearly impossible for him to go to the bathroom at school. Pet. App. 31a, 61a, 73a.

Drew's "behavioral issues interfered with his ability to learn." Pet. App. 56a. Yet the School District's special education teacher claimed to be "unable to discern" any way to prevent his disability-related challenges from impeding his educational progress. *See id.* 56a-57a. Consequently, as Drew grew older, the School District postponed the majority of his academic goals from one year to the next or abandoned them altogether. *See id.* 76a.

The vast majority of Drew's IEP goals for fourth grade were "continued," that is, not achieved. *See* Supp. J.A. 92sa-108sa. Furthermore, Drew was regressing in several areas, including the skills needed to prepare him for an independent life. *Id.* 92a (goal of retelling a passage deemed "no longer appropriate"); *id.* 100sa (regressing in goal of learning division with numbers ranging from 0-5). He was generally unable to express the cause of his feelings to others, *id.* 140sa, to learn his peers' names, *id.* 141sa, or to put on a coat, *see* CA10 J.A. vol. 5, at 196-97.

Drew's negative behaviors – without receiving any coping mechanisms or therapies from his school – intensified. He struggled with self-harming behaviors like head banging. On at least two occasions, he ran away from school unattended. Pet. App. 66a-67a. When he was brought back to school, he became so agitated that he took off his clothing and relieved himself on the floor. *Id.*

The School District's IEP for Drew's fifth grade year had fewer goals than in previous years. And the goals it contained were "the same or similar" to those goals from previous years. Pet. App. 76a; *see also id.* 15a (fifth grade IEP was "similar in all material respects to Drew's past IEPs"). For instance, for the third consecutive year, the IEP included the goal of learning multiplication for single-digit numbers. *See* Supp. J.A. 67sa, 99sa, 135sa.

2. Drew's parents rejected Drew's fifth grade IEP as ineffective and placed him in a private school that specializes in educating children with autism.

The new school immediately recognized that, for Drew to make academic progress, his behavior problems had to be addressed. The school instituted a behavioral intervention plan addressing Drew's particular needs. Supp. J.A. 198sa-200sa. The plan identified each of Drew's problematic "target" behaviors and proposed a specific strategy to deal with them. *Id.* 198sa-199sa. Drew then received applied behavior analysis, *id.* 210sa-217sa, a therapeutic program "the most authoritative voices in American pediatrics have found effective for children with autism," Cert. Br. of Autism Speaks 7. For instance, to increase Drew's ability to tolerate feared items such as flies, teachers in the new school

systematically exposed Drew to the items while providing positive reinforcements aimed at improving Drew's tolerance for each item. Supp. J.A. 199sa.

The new school also ordered a speech therapy consultation. Supp. J.A. 204sa. Based on the consultant's recommendations, Drew was provided regular speech therapy to improve his speaking skills. *Id.* 226a.

The new school enhanced Drew's academic goals as well. Gone were the days in which Drew's IEP goals were largely repeated year after year, with little effort at improvement. In math, for example, Drew's goals went from mastering multiplication through the "threes" table to mastery though the "twelves" table. Supp. J.A. 222sa. Similarly, upon entering the school, Drew was able to do no more than distinguish the proper use of addition and subtraction signs, but his new IEP sought significant improvement, explaining that, with "systematic teaching," Drew would "complete word problems using addition, subtraction, and multiplication." *Id.* And though Drew could identify time on an analog clock only by the hour and half hour, Drew's new IEP expected him, in the coming year, to identify time on a variety of clocks "to the minute." *Id.* 223sa.

Drew immediately made significant "academic, social and behavioral progress." Pet. App. 29a. Less than four months after transferring to the new school, Drew "quickly mastered multiplication," CA10 J.A. vol. 7, at 92, learned to type over 17 words per minute, *id.* vol. 4, at 165, and began identifying emotions in himself and others, *id.* vol. 4, at 161. Within six months, Drew had overcome his fear of public restrooms and the frequency and severity of

his behavioral outbursts were greatly reduced, which, in turn, allowed him to progress academically. *See id.* vol. 4, at 154.

3. Drew's parents filed an IDEA due process complaint in 2012, maintaining that the School District's IEP for his fifth grade year had denied him a FAPE. They pointed to Drew's serious behavioral decline during his attendance at the District's school, to the fact that Drew had made "little to no progress" academically, and to the IEP itself, which included mostly the same objectives as previous years and abandoned other goals. Pet. App. 15a, 76a. Drew's parents sought reimbursement for the tuition at his new school. *Id.* 59a-60a.

The hearing officer sided with the School District. She determined that the District had provided Drew with a FAPE because Drew had received "some" educational benefit while enrolled in public school. Pet. App. 72a.

4. Having exhausted his administrative remedies, Drew, through his parents, filed an IDEA suit in the U.S. District Court for the District of Colorado. The district court reasoned that the "intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." Pet. App. 36a (citation omitted). Viewing the case through that lens, the district court agreed with the hearing officer that the School District had provided a FAPE to Drew because it had enrolled him in classes and enabled him to make "minimal progress" on some of his IEP goals. *Id.* 49a.

5. The Tenth Circuit affirmed. As relevant here, the court of appeals adhered to its holding in a 1996 case that a school district discharges its FAPE obligation so long as it aims to provide a "merely . . . more than *de minimis*" educational "benefit." Pet. App. 16a (quoting *Urban ex rel. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996)). Even under this "merely more than de minimis" test, the Tenth Circuit observed that this was "without question a close case." *Id.* 23a. But because the School District had aimed for just-above-trivial academic progress, the Tenth Circuit held that the School District's proposed fifth grade IEP was "substantively adequate." *Id.*

SUMMARY OF ARGUMENT

I. The Tenth Circuit erred in assessing the substantive adequacy of the School District's actions against a "merely more than de minimis benefit" standard. The IDEA charges schools with providing an "appropriate public education" to children with disabilities. This directive – informed by other provisions of the statute and societal norms – means striving to transmit the "necessary tools" to "prepare [children with disabilities] for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A), (3). What is more, the IDEA demands "equality of opportunity." *Id.* § 1400(c)(1). Schools must set academic goals for students with disabilities commensurate with the targets for the student body as a whole and generally measure their progress against the same challenging benchmarks. Providing a child with a disability with a "merely more than de minimis" educational benefit offers little hope of meeting those objectives.

The Tenth Circuit's standard also contravenes this Court's decision in *Board of Education v. Rowley*, 458 U.S. 176 (1982). *Rowley* explained that the FAPE requirement, as it then existed, required schools to provide services necessary to make access to public education "meaningful" – that is, to "enable the child to achieve passing marks and advance from grade to grade." *Id.* at 192, 204. An educational benefit that is barely more than trivial cannot discharge that duty.

Rowley also makes clear that the IDEA's mandate to provide an "appropriate" education requires accounting for the Act's expressed objectives and implementing provisions. Yet the Tenth Circuit's standard ignores the 1997 and 2004 amendments to the IDEA, which significantly enhanced the Act's commitments to equality of opportunity and measurable educational results and expressly told schools to shun "low expectations," 20 U.S.C. § 1400(c)(4). Once those amendments are integrated into the analysis, it is beyond debate that a "merely more than de minimis" benefit does not provide a FAPE.

II. The most accurate understanding of the IDEA's FAPE requirement is that it obligates schools to provide children with disabilities with substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society. This construction of the words "appropriate education" tracks the Act's directive to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." At the same time, the qualifier "substantially" recognizes that seeking grade-level achievement is not always possible for

children with especially significant cognitive impairments or who have fallen seriously behind their peers.

The "substantially equal opportunity" standard is also eminently workable. Decades of scientific research show that, with proper assistance, children with disabilities generally can perform at the same level as their peers without disabilities. The Department of Education agrees and has instructed school districts accordingly.

Finally, the "substantially equal opportunity" standard leaves school officials ample leeway to craft the particulars of educational programs to meet each child's needs, while protecting the inherent dignity and worth of every child. Educators need not guarantee – much less accomplish – any particular outcomes. But they must set the same kinds of high goals for children with disabilities as they set for their other students. Nothing less than such substantially equal treatment can achieve the IDEA's goals of full participation in the classroom and integration in society.

ARGUMENT

I. The Tenth Circuit's "merely more than de minimis" benefit standard defies the IDEA's directive to provide a "free appropriate public education."

The Tenth Circuit held that a school district provides a child with a disability a "free appropriate public education" if it seeks to provide the child educational benefits that barely exceed de minimis. Pet. App. 16a-23a. This ruling cannot be reconciled with the IDEA's text, purposes, or structure, all of

which require school districts to strive, wherever possible, for much greater academic achievement. Nor is the Tenth Circuit's standard consistent with *Board of Education v. Rowley*, 458 U.S. 176 (1982).

A. The Tenth Circuit's standard is incompatible with the IDEA's text.

1. We begin with the most directly relevant text. *See, e.g.*, *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016). The IDEA requires States to provide children with disabilities a "free *appropriate* public *education*." 20 U.S.C. § 1412(a)(1)(A) (emphasis added). The statute's definition of FAPE, in turn, emphasizes that the special education afforded to such children must include "an *appropriate* preschool, elementary, or secondary school *education* in the State involved." *Id.* §1401(9)(C) (emphasis added).

"Appropriate" means "specially suitable: fit, proper." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 (1983) (quoting *Webster's Third International Dictionary* (1961)). "Suitable," in turn, means "well fitted for the purpose." *Oxford American Dictionary of Current Meaning* 813 (1999). And the IDEA's purposes – discussed in greater detail in the next section – include "ensur[ing] the effectiveness of efforts to educate children with disabilities," providing children with disabilities the "necessary tools to improve educational results," and "prepar[ing] them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A), (3), (4).

No one, much less the parents and educators who together craft each child's IEP, could properly view an IEP aimed at "merely . . . more than *de minimis*" educational achievement, Pet. App. 16a (quotation marks and citation omitted), as one calculated to

accomplish those purposes. Something is considered de minimis when it is "trifling," "negligible," or "so insignificant that a court may overlook it," *Black's Law Dictionary* (10th ed. 2014) – that is, "[t]oo trivial or minor to merit consideration." *English Oxford Living Dictionaries* (2016).[2] Thus, an IEP that seeks an educational "benefit" that is "merely more than de minimis" is one that aims for educational achievement that barely exceeds the trivial.

As the United States has explained, "[n]o parent or educator in America" would view that standard as an acceptable goal for educating children with disabilities. U.S. Cert. Br. 14. The standard, for instance, would tolerate an IEP that sought a student's minimal achievement in reading without seeking any achievement at all in math – or in targeting just a few multiplication tables or rules of grammar, even where the student is capable of learning more. Or it would tolerate providing a sign language interpreter for one hour of the day but not other periods where it would be equally beneficial. It is hard to fathom how such actions would be "appropriate."

2. This conclusion is bolstered by considering the statutory term that "appropriate" is modifying: "public education." *See, e.g., Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) (proper understanding of statutory terms are often crystallized by neighboring terms); Singer & Singer, 2A *Statutes and Statutory Construction* § 47:16 (7th ed. 2014). Mandating an "education" is different from, demanding, say, mere

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[2] https://en.oxforddictionaries.com/definition/us/de_minimis.

"access to schools" or "accommodations in classrooms." In society's view, public education is a profound endeavor – an essential building block for democratic citizenship and for socialization, as well as a key determinant of a child's future economic well-being and independence. *See* William J. Reese, *America's Public Schools* 215-19 (2011).

This understanding of public education is deeply rooted in this Court's precedents, which "have consistently recognized the importance of education to the professional and personal development of the individual." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 437 (1993) (Blackmun, J., concurring); *see also Plyler v. Doe*, 457 U.S. 202, 221 (1982) (stressing "the importance of public education in maintaining our basic institutions" and "on the life of the child"). "[E]ducation," the Court has explained, "provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Plyler*, 457 U.S. at 221. It "prepares individuals to be self-reliant and self-sufficient participants in society." *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). And it is "the principal instrument [of state and local government] in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

This Court's understanding of the role of education comports with the contemporary "common understanding" of that term. *Perrin v. United States*, 444 U.S. 37, 45 (1979); *see also, e.g., Bond v. United States*, 134 S. Ct. 2077, 2090 (2014) (common understanding of statutory term provides guidance);

Rousey v. Jacoway, 544 U.S. 320, 326 (2005) (same). "Education" today is understood to denote preparation for living a useful, fulfilling, and independent life in a complex world. Thus, for instance, a leading organization that emerged from the 1996 National Education Summit of a bipartisan group of governors and corporate leaders describes "education" as targeted at "ensuring all students graduate from high school 'college and career ready,' or, in other words, fully prepared academically for any and all opportunities they choose to pursue." Achieve, Inc., *Our Agenda*, http://www.achieve.org/ college-and-career-ready-agenda.

In light of this robust understanding of "education," the IDEA's insistence on an "appropriate *education*" signals that schools must seek educational attainment for their students with disabilities that is well beyond just-above-trivial. Schools must provide students with disabilities substantial opportunities designed to allow them to succeed academically and to lead meaningful and economically productive lives.

B. The Tenth Circuit's standard thwarts the IDEA's express purposes.

When this Court construes a statutory phrase, it "look[s] not only to the particular statutory language, but also to the design of the statute as a whole and to its object and policy." *Neguise v. Holder*, 555 U.S. 511, 519 (2009) (quotation marks and citation omitted). This is particularly important when interpreting the word "appropriate," which necessarily "requires references to other sources" to determine what the thing it modifies "should be 'specially suitable,' 'fit,' or 'proper' *for*." *Ruckelshaus*, 463 U.S. at 683.

Identifying the object and policy of a statute is sometimes difficult. But here, it "requires no guesswork to ascertain Congress' intent regarding" the IDEA, "for Congress included a detailed statement of the statute's purposes" and detailed legislative findings. *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2233 (2014) (internal citations and quotation marks omitted); *see also, e.g., Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 744 (2014) (affording substantial weight to express congressional findings in determining statutory meaning); *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740, 751 (2012) (same).

Congress has declared that the IDEA is designed to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1). In other words, the purpose of requiring school districts to provide a "free appropriate public education" is "to improve educational results for children with disabilities" and to prepare them "for further education, employment, and independent living." *Id.* § 1400(d)(1)(A), (3). Those purposes are built on express congressional findings – some dating back to the original Act – that despite "advance[s]" in teacher training and instructional methods, the educational needs of children with disabilities were "not [previously] being fully met" and that many children with disabilities were not "receiv[ing] appropriate educational services which would enable them to have full equality of opportunity." Pub. L. No. 94-142, § 3(a), 89 Stat. 773, 774 (1975) (codified in substantially identical form at 20 U.S.C. § 1400(d)(1)(A), (4)).

It defies belief that a statute designed to "ensure equal opportunity" and the "effectiveness" of the states' special educational efforts would also authorize states to seek just-above-trivial educational advancement for children with disabilities. A statute that seeks to provide "equality of opportunity" for children with disabilities would not give educators license to seek barely more than educational benefits the law would regard as de minimis.

C. The Tenth Circuit's standard cannot be reconciled with the IDEA's FAPE-implementing provisions.

In addition to considering a statutory phrase's text and purpose, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012) (quotation marks and citation omitted). Indeed, "[i]t is necessary and required that an interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning." *Maracich v. Spears*, 133 S. Ct. 2191, 2203 (2013); *see also, e.g., Holloway v. United States*, 526 U.S. 1, 6 (1999). And this Court has stressed the importance of this precept when construing the IDEA, explaining that a "proper interpretation of the Act requires a consideration of the entire statutory scheme." *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 523 (2007).

Applying this basic interpretive principle, the Tenth Circuit's "merely more than de minimis" standard is irreconcilable with various IDEA provisions that implement the FAPE requirement.

1. The "primary vehicle for implementing" the IDEA's "enforceable substantive right to public education . . . is the 'individualized educational program,'" or IEP. *Honig v. Doe*, 484 U.S. 305, 310-11 (1988). As explained earlier, an IEP is an annual plan "which the [Act] mandates for each disabled child." *Id.* at 311. Crafted by educators in collaboration with parents, it sets each child's educational goals and objectives for the coming academic year. *See* 20 U.S.C. § 1414(d).

This statutory link between a child's IEP and the provision of a FAPE is fundamental to the IDEA's operation. It originates in the Act's definition of FAPE, which requires "that special education be provided *in conformity with the individualized education program* required under" the Act. 20 U.S.C. § 1401(9)(D) (emphasis added). The Act's particular IEP requirements, therefore, "provide reliable insight into what level of education Congress would have deemed 'appropriate' for purposes of the FAPE requirement." U.S. Cert. Br. 15.

An IEP must include a statement of the child's "present levels of achievement," including how "the child's disability affects the child's involvement and progress in the general education curriculum." 20 U.S.C. § 1414(d)(1)(A)(i)(I)(aa); *see also* 34 C.F.R. § 300.320(a)(1)(i) (making clear "general education curriculum" for children with disabilities is "the same curriculum as for nondisabled students"). An IEP must have "a statement of annual goals, including academic and functional goals, designed to . . . enable the child to be involved in and make progress in the general education curriculum" and "meet each of the child's other educational needs." 20 U.S.C.

§ 1414(d)(1)(A)(i)(II)(aa), (bb). It must also contain a "description of how the child's progress meeting the[se] annual goals . . . will be measured" and when periodic reports will be issued "on the progress the child is making toward meeting the annual goals." *Id.* § 1414(d)(1)(A)(i)(III). Thus, the IEP must reflect the results of an annual assessment of the child's academic status, *see id.*, and then, against that baseline, it measures the child's ability to "make progress" – that is, to attain greater achievement – year after year. *Id.* § 1414(d)(1)(A)(i)(II)(aa).

As the United States has explained, Congress would not have trained its attention "on promoting measurable annual progress" through the IEP, "if at the end of the day" it believed that schools had to provide only "some degree of educational benefit that is barely more than trivial." U.S. Cert. Br. 15.

That is not all. An IEP also must contain a statement of the particular special education and related services that will be provided to the child, "based on peer-reviewed research to the extent practicable," as well as an explanation of "program modifications or supports for school personnel that will be provided for the child – to advance appropriately toward attaining the [child's] annual goals." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). It would not be worth the candle to demand that educators invest the effort required to justify an IEP's educational goals with peer-reviewed research, or the expense needed to provide support for school personnel in meeting each child's annual goals, if minimal educational attainment was all that the IDEA demanded.

Finally, for children aged 16 and older, each IEP must include "appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment" and "the transition services needed to assist the child in reaching those goals." 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa), (bb). This requirement envisions children with disabilities as fully engaged, valuable members of their communities, emerging from public school ready for college, other further training, productive employment, and independent living – just like their peers without disabilities. This IEP requirement is incompatible with a view of FAPE that seeks only just-above-trivial educational benefit. A child with a disability, who for a dozen or more years has struggled with IEPs aimed at a "merely more than de minimis" educational benefit, could not possibly be poised to achieve the post-high school goals envisioned by the IDEA.

2. The Tenth Circuit's standard is also incompatible with the IDEA's focus on *individualized* educational services. Various provisions of the Act – beginning, as just explained, with the requirement of drafting an "*individualized* education program" for each child, 20 U.S.C. § 1414(d) (emphasis added) – demand that school districts provide an education "in relation to each child's potential." *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 578 (3d Cir. 2000) (Alito, J.); *see also, e.g.*, 20 U.S.C. § 1400(d)(1)(A) (education provided to children with disabilities must be "designed to meet their unique needs"); *Rowley*, 458 U.S. at 203 (FAPE must be "personalized"). Because "logic dictates that the benefit 'must be gauged in relation to a child's potential,' [o]nly by considering an individual child's

capabilities and potentialities may a court determine whether an educational benefit provided to that child allows for meaningful advancement." *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 864 (6th Cir. 2004) (citation omitted).

When a child is fully capable with proper assistance of achieving at a high level, it could hardly be thought "appropriate" to seek for that child a "merely more than de minimis" educational benefit. Doing so would squander that child's potential, in derogation of the IDEA's objective of enabling children with disabilities to obtain educational services "designed to meet their unique needs" that enable them to meet "high expectations" and the "developmental goals" applicable to all children, 20 U.S.C. §§ 1400(c)(1), (5) & (d)(1)(A).

3. Other key provisions of the IDEA further underscore the Tenth Circuit's erroneous understanding of the FAPE requirement. In crafting its plan for implementing the Act, each state "must establish[] a goal of providing *full* educational opportunity to all children with disabilities." 20 U.S.C. § 1412(a)(2) (emphasis added). The states must "establish goals for the performance of children with disabilities" that "promote the [express] purposes of this chapter." *Id.* § 1412(a)(15)(A)(i). These goals include ensuring that schools "improve educational results for children with disabilities" and that children with disabilities are prepared "for further education, employment, and independent living." *Id.* § 1400(d)(1)(A), (3); *see supra* 20-21 (discussing express statutory purposes).

To these ends, the IDEA requires that, to the extent possible, "[a]ll children with disabilities are

included in all general State and districtwide assessment programs, including assessments described under" the Elementary and Secondary Education Act (ESEA), 20 U.S.C. § 1412(a)(16)(A) (incorporating ESEA requirements codified at 20 U.S.C. § 6311(b)). ESEA, in turn, requires States to employ "*challenging* academic standards and academic assessments . . . that will be used by the State, its local educational agencies, and its schools." 20 U.S.C. § 6311(b)(1)(A) (emphasis added). In doing so, each state "must demonstrate" that its "challenging academic standards" are "aligned with the entrance requirements" for the state's public colleges and universities. *Id.* § 6311(b)(1)(D)(i).

Under ESEA, states must implement their challenging standards for students with disabilities through "a set of high-quality student academic assessments" in math, reading or language arts, and science, 20 U.S.C. § 6311(b)(2)(A), administered to students regularly from third through twelfth grade, *id.* § 6311(b)(2)(B)(v). These tests must "involve multiple up-to-date measures of student academic achievement, including *measures that assess higher-order thinking skills and understanding.*" *Id.* § 6311(b)(2)(B)(vi) (emphasis added).

Moreover, the assessments ESEA contemplates must be administered to "all students," 20 U.S.C. § 6311(b)(2)(B)(vii)(I) – that is, to those with and without disabilities. In this regard, Congress specifically required that children served under the IDEA be provided "appropriate accommodations" necessary to measure their academic achievement in relation to the challenging academic standards. *Id.* § 6311(b)(2)(B)(vii)(II) (citing 20 U.S.C. § 1401(3)).

Where children have serious cognitive disabilities, ESEA authorizes states to "adopt alternate academic achievement standards." 20 U.S.C. § 6311(b)(1)(E)(i)(I), (II). But even those assessments must be "aligned with [ESEA's] challenging State academic content standards," and "promote access to the general education curriculum" available to all students. *Id.* Moreover, these alternative standards "must reflect professional judgment as to *the highest possible standards achievable* by" students with significant cognitive disabilities. *Id.* § 6311(b)(1)(E)(i)(III) (emphasis added). Expressly cross-referencing the IDEA, ESEA requires that these alternative academic achievement standards be used "for each [affected] student" and be "designated in" each student's IEP. *Id.* § 6311(b)(1)(E)(i)(IV) (citing 20 U.S.C. § 1414(d)(3)). Finally, these alternative standards must be "aligned to ensure" that a student who meets these high standards "is on track to pursue postsecondary education or employment" consistent with the federal Rehabilitation Act. *Id.* § 6311(b)(1)(E)(i)(V) (citing Pub. L. No. 93-112, 87 Stat. 355 (1973)).[3]

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[3] The principal purpose of the Rehabilitation Act is "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society." 29 U.S.C § 701(b)(1). As particularly relevant here, the Rehabilitation Act seeks "to ensure, to the greatest extent possible, that youth with disabilities and students with disabilities who are transitioning from receipt of special education services under the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.) . . . have opportunities for postsecondary success." 29 U.S.C. § 701(b)(5).

Congress linked the IDEA with ESEA's insistence on challenging academic standards and assessments for a reason: It determined that "too many children in special education classes [were being] left behind academically," H.R. Rep. No. 108-77, at 83 (2003), so, wherever possible, it wanted children with disabilities to be held to the same standards as all other children. Congress recognized that, although "the underlying premise of the [IDEA] was to educate children in a manner equal to their nondisabled peers," it was necessary to "shift from process accountability" to accountability concerning "substantive performance of students with disabilities." S. Rep. No. 108-185, at 46 (2003). By "align[ing] the IDEA with the accountability system established under" ESEA, Congress sought to "ensure that all children, including children with disabilities, are held to high academic achievement standards" and that schools seek adequate yearly progress of all students. *Id.* at 17-18.[4]

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[4] For other legislative history showing that IDEA's incorporation of ESEA's standards was intended to hold children with disabilities to high levels of academic achievement, see H.R. Rep. No. 108-77, at 78, 96-97, 108-111, 120, 130; S. Rep. No. 108-185, at 2-3, 4-6, 28-29 (2003); 103 Cong. Rec. H3458 (Apr. 30, 2003) (statement of Rep. Sessions); 150 Cong. Rec. H10010-11, H10019-20 (Nov. 19, 2004) (statement of Rep. Boehner); 150 Cong. Rec. H10014 (Nov. 19, 2004) (statement of Rep. Castle); 150 Cong. Rec. H10016-17 (Nov. 19, 2004) (statement of Rep. Ehlers); 150 Cong. Rec. S11654 (Nov. 19, 2004) (statement of Sen. Gregg); 150 Cong. Rec. S11656 (Nov. 19, 2004) (statement of Sen. Dodd); 150 Cong. Rec. S11658-59 (Nov. 19, 2004) (statement of Sen. Bingaman).

The Tenth Circuit's adherence to the just-above-trivial standard runs headlong into the IDEA's and ESEA's demands for academic accountability and achievement. If the Tenth Circuit were correct that IEPs can be aimed at providing educational benefits that barely exceeded the trivial, it would make no sense for the IDEA to require IEPs to seek, wherever possible, academic accountability through "challenging State academic content standards," 20 U.S.C. § 1412(a)(16)(C)(ii)(I), and exacting academic assessments, *id.* § 6311(b)(2). Nor would the statute insist, even for students with the most serious cognitive disabilities, that states adopt "academic achievement standards" based on "the highest possible standards achievable by such students." *Id.* § 6311(b)(1)(E)(i)(III). But the IDEA *does* make those demands, thus showing it does not tolerate the meager educational aims the Tenth Circuit has ascribed to it.

D. The Tenth Circuit's standard misapprehends this Court's decision in *Rowley*.

The Tenth Circuit's "merely more than de minimis" benefit test contravenes *Board of Education v. Rowley*, 458 U.S. 176 (1982). Nothing in the Court's opinion says that school districts can satisfy the IDEA by providing just-above-trivial, or "merely more than de minimis," educational benefits to children with disabilities. To the contrary, the opinion indicates schools must aim much higher, and subsequent amendments to the IDEA solidify that demand.

1. *Rowley* involved a deaf child who was "remarkably well-adjusted," "perform[ing] better

than the average child in her class," and "advancing easily from grade to grade." 458 U.S. at 185 (quoting district court findings). She argued that, even though she was "receiving substantial specialized instruction and related services," she was not receiving a FAPE because her school district was not giving her "a potential-maximizing education." *Id.* at 197 n.21, 202; *accord id.* at 198-99.

This Court rejected that argument. *See Rowley*, 458 U.S. at 200. Nothing in the IDEA requires schools to aim for higher levels of achievement for children with disabilities than for children without disabilities. And public schools do not typically offer educational services designed to "maximize" the potential of every child without a disability. *Id.* at 199.

At the same time, the Court emphasized that the IDEA requires schools to provide children with disabilities more than simply "access" to their classrooms and other facilities. 458 U.S. at 201. The statute requires schools to supply enough "substantive educational" benefit "to make such access *meaningful*." *Id.* at 192 (emphasis added). Access that is "meaningful" is access that is infused with "significance, purpose, or value," *Webster's Unabridged Dictionary* 1191 (Random House 2d ed. 1998) – or, as the Court put it later in the opinion, an education "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."458 U.S. at 204; *see also id.* at 203 ("Children who graduate from our public schools are considered by our society to have been 'educated' at least to the grade level they have completed.").

Providing a "meaningful" education that includes "personalized instruction and related services," 458 U.S. at 192, 203, requires conferring much more than a just-above-trivial benefit for children with disabilities. Indeed, the just-above-trivial-benefit standard used by the Tenth Circuit is practically the opposite of making access to public education "meaningful."

2.a. The Tenth Circuit has embraced a "merely more than de minimis" standard premised on a statement elsewhere in *Rowley* that the Act was intended to confer "*some* educational benefit" on children with disabilities. Pet. App. 16a (quoting *Rowley*, 458 U.S. at 200) (emphasis added by Tenth Circuit); *see also O.S. v. Fairfax County Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015) (same). That approach is misguided.

To be sure, the word "some," read in isolation, *occasionally* means a slight amount. (Even when signifying a certain amount, though, the word usually connotes more than a negligible level.) But that is not the way in which *Rowley* used the term. Read in the full context of this Court's decision, *Rowley*'s statement that schools must provide "some" benefit simply notes that the IDEA imposes not just procedural demands but also a *substantive* obligation to provide "specialized instruction and related services." 458 U.S. at 201. The Court did not use the word "some" to pinpoint the level of that substantive obligation – that is, exactly "*when* handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act." *Id.* at 202 (emphasis added).

When the Court turned to that question, it said that it was not attempting "to establish any one test for determining the adequacy of educational benefits." *Rowley*, 458 U.S. at 202. But the Court did make clear that the FAPE requirement, as it then existed, required schools to provide the services necessary to make access to public education "meaningful" and to "enable the child to achieve passing marks and advance from grade to grade." *Id.* at 192, 204. As just explained, that target is considerably higher than what the "merely more than de minimis" standard permits. A student might well receive more than a de minimis amount of educational benefit without being positioned for advancement to the next grade.

b. The School District advances an even emptier reading of *Rowley* than does the court of appeals. According to the School District, *Rowley* holds that "the IDEA achieves Congress's goals through its *procedures*" only and prohibits courts from "second-guess[ing] the *substance* of [schools'] educational decisions by requiring a 'particular . . . level of education.'" Resp. Supp. Br. 9 (quoting *Rowley*, 458 U.S. at 192). Likening the IDEA to the Administrative Procedure Act's arbitrary-and-capricious standard of judicial review, the School District further claims that the IDEA's supposedly exclusive focus on procedures is all that is needed to "ensure" that educators "aim high" when they craft IEPs. *Id.*

This argument blinks reality on several levels. First, *Rowley* repeatedly says that the FAPE requirement imposes a *substantive* duty on school districts to educate children with disabilities. *See* 458 U.S. at 206 (noting that the IDEA has "a substantive

standard"); *id.* at 205 (the Act has "substantive admonitions"). Lest there be any doubt, this Court has expressly repeated the point three times since *Rowley*. In *Smith v. Robinson*, 468 U.S. 992, 1010 (1984), the Court declared outright that "the Act establishes an enforceable substantive right to a free appropriate public education." In *Honig v. Doe*, 484 U.S. 305, 310 (1988), the Court explained that the IDEA "confers upon disabled students an enforceable substantive right to public education." And in *Winkelman v. Parma City School District*, 550 U.S. 516, 531-32 (2007), the Court held that that the IDEA authorizes parents to sue on their children's behalf over "the substantive inadequacy of their child's education."

That the Act's FAPE obligation requires school districts to seek a substantive level of educational attainment is evident, too, in the Act's provisions conferring decisional authority on "due process" hearing officers. Those provisions state that "in general," hearing officers' decisions "shall be made on *substantive* grounds based on a determination of whether the child received a free appropriate public education." 20 U.S.C. § 1415(f)(3)(E)(i) (emphasis added); *see also id.* § 1415(f)(3)(E)(ii) (allowing relief when school district "caused a deprivation of educational benefits").

Second, the School District's analogy to the Administrative Procedure Act is inapt. That law, as its name indicates, governs *procedure*; indeed, the provision on which the School District relies establishes only a standard for *judicial review* of agency action. *See* Resp. Supp. Br. 9 (citing 5 U.S.C. § 706(2)(A)). By contrast, the FAPE requirement is a

substantive, on-the-ground requirement imposed on school districts in locating and evaluating eligible children, crafting and revising IEPs, and providing children with disabilities with special education and related services. *Id.* §§ 1412(a)(3), (4), (7) & 1414. Indeed, the first obligation that the Act imposes on states is to ensure that a "free appropriate public education is available to all children with disabilities residing in the State." *Id.* § 1412(a)(1)(A).

Third, contrary to the School District's assertion, a procedures-only conception of the IDEA would fail to "ensure" that school districts aim for a high level of academic achievement. This case proves the point. The courts below acknowledged that Drew's progress had been "minimal," Pet. App. 49a (district court), and that his fifth grade IEP "was similar in all material respects to [his] past IEPs," *id.* 15a (court of appeals). Indeed, the Tenth Circuit characterized it as a "close case" whether the School District had aimed even for more than merely trivial achievement. *Id.* 23a. Yet the Tenth Circuit blessed the School District's decision about what to offer Drew. That is another way of saying that the School District aimed low, and that doing so was good enough.

It may well be, as the School District maintains, that schools often will aim high. And when they do, disputes over the FAPE requirement generally will be avoided. But neither *Rowley* nor anything in the IDEA itself lets schools off the hook if they, like the School District here, view FAPE as merely a procedural guarantee that authorizes them to seek just-above-trivial substantive advancement for children with disabilities.

3. The Tenth Circuit's "merely more than de minimis" standard, originally adopted in 1996, also contravenes *Rowley* because it ignores the subsequent amendments to the IDEA. *See* Pet. App. 16a (citing *Urban ex rel. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996)). *Rowley* instructs that the personalized instruction and related services that constitute a FAPE "should be formulated in accordance with the requirements of the Act" and consonant with "the goal[s] of the Act." 458 U.S. at 198, 203-04 (quotation marks and citation omitted). And insofar as Congress enhanced the IDEA's requirements and goals in 1997 and 2004, the statute's command to provide an "appropriate" education demands recalibration to account for those enhancements.

Another decision involving the statutory term "appropriate" demonstrates why this is so. In *West v. Gibson*, 527 U.S. 212 (1999), this Court considered whether Title VII allows the EEOC to award the remedy of compensatory damages. The statute, as originally enacted in 1972, gave the EEOC the authority to enforce it "through *appropriate* remedies." *Id.* at 217 (emphasis in original) (quoting 42 U.S.C. § 2000e-16(b)). In 1991, without touching that provision, Congress amended Title VII to permit a "complaining party" for the first time to "recover compensatory damages." *Id.* at 215 (quoting 42 U.S.C. § 1981a(a)(1)).

This Court explained that "[w]ords in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic." *West*, 527 U.S. at 218. That being so, the

Court held that when Congress used the term "appropriate," it "d[id] not freeze the scope" of permissible remedies in time. *Id.* Rather, "[t]he meaning of the word 'appropriate' permit[ted] its scope to expand to include Title VII remedies that were not appropriate before 1991, but in light of legal change are appropriate now." *Id.*; *see also Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (statutory term "appropriate" "naturally and traditionally includes consideration of all the relevant factors" (quotation marks and citation omitted)); *Sossamon v. Texas*, 563 U.S. 277, 286 (2011) ("appropriate" is "inherently context dependent").

The same logic applies here. Petitioner disputes that the Tenth Circuit's "merely more than de minimis" standard is faithful to the IDEA as originally enacted or is a fair reading of *Rowley*. But whatever the precise substantive demand of an "appropriate" education was then, the 1997 and 2004 amendments significantly strengthened the IDEA's mandate and heightened its emphasis on striving for equality of opportunity. *See supra* 6-8; *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1213 n.3 (9th Cir. 2008) (The amendments "represented a significant shift in the focus from the disability education system prior to 1997."); *Deal*, 392 F.3d at 864 (same); Tara L. Eyer, *Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity for Children with Disabilities*, 126 Educ. L. Rep. 1, 17 (1998) (same).[5] Those amendments,

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[5] Numerous other commentators have made the same observation. *See* Dixie Snow Huefner, *Updating the FAPE Standard Under IDEA*, 37 J.L. & Educ. 367, 377-79 (2008); Scott

which responded to "[a]lmost 30 years of research and experience" under the Act, 20 U.S.C. § 1400(c)(5), make clear beyond a shadow of a doubt that a school district that seeks a just-above-trivial educational benefit has not provided a FAPE.

In particular, Congress found in 1997 that "the implementation of this Act ha[d] been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." Pub. L. No. 105-17, § 101, 111 Stat. 37, 39 (2007) (codified as amended at 20 U.S.C. § 1400(c)(4)). The 1997 amendments, therefore, instructed school districts that their provision of FAPEs "can be made more effective by . . . having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible." *Id.* (codified as amended at 20 U.S.C. § 1400(c)(5)).

The amended objectives of the IDEA reflect these extensive post-*Rowley* findings, derived from decades of on-the-ground experience. In 1997, Congress declared for the first time: "Disability is a natural part of the human experience and *in no way* diminishes the right of individuals to participate in or contribute to society." Pub. L. No. 105-17, § 101, 111 Stat. 37, 38 (1997) (codified at 20 U.S.C. § 1400(c)(1)) (emphasis added). Therefore, among the amendments' express purposes is to ensure that

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F. Johnson, *Reexamining* Rowley*: A New Focus on Special Education Law*, 2003 BYU Educ. & L.J. 561, 585; Mitchell L. Yell et al., *Reflections on the 25th Anniversary of the U.S. Supreme Court's Decision in* Board of Education v. Rowley, Focus on Exceptional Children 1, 9 (May 2007).

children with disabilities – just like all other children – obtain an education that prepares them "for further education, employment and independent living." 20 U.S.C. § 1400(d)(1)(A)).[6]

To that end, the 1997 amendments "place[d] greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (quoting S. Rep. No. 105-17, at 3 (1997)). The amendments required, among other things, that states for the first time include children with disabilities in general state and districtwide assessment programs. *See* 20 U.S.C. § 1412(a)(16). The amendments further sought to enable children with disabilities "to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children" so that they are "prepared to lead productive, independent, adult lives, to the maximum extent possible." Pub. L. No. 105-17, § 101, 111 Stat. 37, 39 (1997) (codified as amended at 20 U.S.C. § 1400(c)(5)(A)).[7]

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[6] The 1997 amendments' findings and purposes came on the heels of those in the American with Disabilities Act of 1990 (ADA), which ushered in "a new awareness, a new consciousness, a new commitment to better treatment of those disadvantaged by mental or physical impairments." *Bd of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 376 (2001) (Kennedy, J., concurring); *see also* 42 U.S.C. § 12101 (findings and purposes of ADA).

[7] In 1997, Congress also enacted what is now subchapter IV of the Act, 20 U.S.C. § 1450 *et seq.*, establishing grant programs for states seeking to enhance their "systems for providing educational, early intervention, and transitional services . . . to

The 2004 amendments further refined and elevated the IDEA's concept of an "appropriate public education." These amendments instruct that a FAPE should prepare children with disabilities for post-secondary education as well as for employment and independent living. *See* Pub. L. No. 108-446, § 101, 118 Stat. 2647, 2648-49 (2004) (codified at 20 U.S.C. § 1400(d)(1)(A)). Consistent with this directive, the Act for the first time required that, beginning at age 16, each IEP describe "appropriate measurable postsecondary goals" for the child's training, education, employment, and independent living skills and "the transition services . . . needed to assist the child in reaching those goals." 20 U.S.C. § 1414(d)(1)(A)(i)(VIII). And in harmony with a new congressional finding that education for children with disabilities "can be made more effective" by employing the "improvement efforts" established under ESEA, *id.* § 1400(c)(5)(C), Congress required children served by the IDEA to be held accountable under ESEA's challenging academic standards and periodic assessments, *id.* § 1412(a)(16); *see supra* 26-28.

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improve results for children with disabilities." Pub. L. No. 105-17, § 101, 111 Stat. 37, 124 (1997) (codified as amended at 20 U.S.C. § 1451(a)). In passing this subchapter, Congress found that "[a]n effective educational system serving students with disabilities should . . . maintain high academic achievement standards and clear performance goals for children with disabilities, consistent with the standards and expectations for all students in the educational system, and provide for appropriate and effective strategies and methods to ensure that all children with disabilities have the opportunity to achieve those standards and goals." 20 U.S.C. § 1450(4)(A).

None of these enhanced objectives can be achieved under the Tenth Circuit's pre-amendments standard. Nor would it make any sense to establish high expectations for children with disabilities and to administer the same challenging assessments given to other students if all schools had to do was to seek a merely more than de minimis educational benefit. Schools would be setting up children with disabilities to fail.

II. A FAPE is an education that seeks to provide children with disabilities with substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society.

The free and appropriate public education that the IDEA requires is an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities. This standard flows directly from the same sources that demonstrate that the Tenth Circuit's decision is wrong: the IDEA's text, declared purposes, and structure. It also is eminently workable.

A. This standard flows directly from the IDEA's text, purposes, and structure.

1. The most accurate understanding of the IDEA's FAPE requirement is that it obligates schools to provide children with disabilities with substantially equal opportunities to achieve academic

success, attain self-sufficiency, and contribute to society.[8]

This "substantially equal opportunity" standard correctly describes the FAPE requirement because, as petitioner has explained, the IDEA's language indicates that an "appropriate public education" is something of considerable importance and value. *See supra* 30-31. In particular, a FAPE must be aimed at improving educational results on par with a school's student body as a whole. 20 U.S.C. § 1412(a)(1)(A). Furthermore, a school must strive, to the extent feasible, to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1); *see also* 20 U.S.C. § 1400(d)(1) (IDEA enacted "to ensure that all children with disabilities have available to them a free appropriate public education that . . . prepare[s] them for further education, employment, and independent living").

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[8] Reflecting the nomenclature used in the lower courts, the petition maintained that the FAPE requirement compels schools to provide a "substantial educational *benefit*." Pet. 21 (emphasis added). At the same time, this Court has explained that education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Plyler v. Doe*, 457 U.S. 202, 221 (1982). For that reason, and to provide better forward-looking guidance to school officials and parents who draft IEPs on the front lines, we believe it would be useful for the legal standard to be more fully informative. We therefore now describe the FAPE standard as requiring schools to provide children with disabilities "substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society."

At the same time, the qualifier "substantially" accounts for the fact that the IDEA does not demand "*strict* equality of opportunity or services." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 198 (1982) (emphasis added). In circumstances involving students with "the most significant cognitive disabilities," states have leeway to "adopt alternative academic achievement standards." 20 U.S.C. § 6311(b)(1)(E)(i). Those standards, as elaborated above, still must be "aligned with [ESEA's] challenging State academic content standards," "promote access to the general education curriculum" available to all students, and be aimed at preparing students for "postsecondary education or employment." *Id.*; *see also supra* 26-28. But the IDEA recognizes that it is "appropriate" in this setting to adjust expectations for achievement.

2. The IDEA's provisions that implement the FAPE requirement also dictate the "substantially equal opportunity" standard. In particular, the Act demands that each child's IEP measure annual educational gains to enable her to "make progress in the general education curriculum," 20 U.S.C. § 1414(d)(1)(A)(i)(II)(aa), (bb), and, for children aged 16 or older, set measurable goals and provide appropriate services to enable the child to transition to post-secondary education, training, and employment, *see id.* § 1414(d)(1)(A)(i)(VIII); *see also supra* 39-40. The IDEA also requires that children with disabilities be held to the same "challenging academic content standards" and "academic achievement standards" as children without disabilities. 20 U.S.C. § 1412(a)(16)(C)(ii)(I) (incorporating the provisions of the Elementary and Secondary Education Act at 20 U.S.C. § 6311(b)); *see supra* 26-28.

These provisions show not only that the IDEA precludes a just-above-trivial FAPE standard, but that when the statute required schools to provide children with disabilities with a free and appropriate public education, it is focused on something much more. It wanted to ensure that children with disabilities would receive IEPs designed to provide them with substantially equal educational opportunities to those enjoyed by their peers without disabilities.

3. The "substantially equal opportunity" standard also comports with this Court's decision in *Rowley*. That decision characterizes an "appropriate public education" as one that provides "meaningful" educational access to the public schools – that is, education infused with significance, purpose, and value. *See supra* 30-31. And this Court held that the school district there had provided Amy Rowley with a FAPE because it had delivered "*substantial* specialized instruction and related services" that were "reasonably calculated to enable [her] to achieve passing marks and advance from grade to grade." 458 U.S. at 202, 204 (emphasis added). Finally, *Rowley* requires a FAPE to align with the IDEA's objectives and IEP-implementing requirements, and the post-*Rowley* amendments to the IDEA make clear that schools cannot meet those demands by providing children anything less than substantially equal opportunities to succeed. *See supra* 35-40.

B. This standard is eminently workable.

1. While the IDEA's goals are ambitious, they are achievable. Categorized by disability, the largest group of children served by the IDEA – roughly 40% – are those with learning disabilities. U.S. Dep't of

Educ., *37th Annual Report to Congress on the Implementation of the Individuals with Disabilities Act* 36 (2015) ("37th Annual Report").[9] Children with learning disabilities often have a language skill impairment that "may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations." 34 C.F.R. § 300.8(c)(10). But with the right help, they can thrive academically and leave school as "self-determined young people." Michael Wehmeyer & Michelle Schwartz, *Self-Determination and Positive Adult Outcomes*, 63 Exceptional Children 245, 253 (1997). Indeed, research shows that many grow up to become "highly successful adults" who contribute "handsomely to society." Paul J. Gerber, Rick Ginsberg, and Henry B. Reiff, *Identifying Alterable Patterns in Employment Success for Highly Successful Adults with Learning Disabilities*, 25 J. Learning Disabilities 475, 486 (1992).

Take, for example, children with dyslexia. Dyslexia is a language-based disability that can impair reading fluency and comprehension, writing, spelling, and even speech. Absent intervention, the disability can hamper a child's ability to absorb and process information and to progress from grade to grade. But with proper personalized instruction and tools as simple as iPads, children with dyslexia typically achieve at the same levels as others in their classes. *See, e.g.*, Sally E. Shaywitz et al., *The Education of Dyslexic Children from Childhood to*

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[9] http://www2.ed.gov/about/reports/annual/osep/2015/parts-b-c/37th-arc-for-idea.pdf.

Young Adulthood, 59 Ann. Rev. Psychology 451 (2008).

Other children served by the IDEA have orthopedic and other health conditions, such as heart conditions, leukemia, and sickle cell anemia. *See* 34 C.F.R. § 300.8(c)(8), (9). With the provision of specialized services and assistive technology, these conditions do not prevent them from participating and thriving in their schools' academic programs. *See Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 888-95 (1984); 37th Annual Report, at 36 (13.8% of children served by the IDEA have "[o]ther health impairments" including various physical disabilities). So, too, for many children with autism, who comprise more than eight percent of children served by the IDEA. *See* 37th Annual Report, *supra*, at 36. Like Drew, children with autism often flourish in school with proper special education services. *See* Cert. Br. of Autism Speaks 7-8, 19-22.

In light of these realities and the IDEA's expressed desire to advance "our national policy in ensuring equality of opportunity," 20 U.S.C. § 1400(c)(1), the "substantially equal opportunity" standard generally requires schools to seek grade-level achievement for children with disabilities (as schools do for children without disabilities) through IEPs reasonably calculated to that end. After all, the IDEA requires children with disabilities to be integrated into the general education curriculum, which, by definition, strives for grade-level achievement wherever possible. *See, e.g.*, 20 U.S.C. § 6311(b)(2)(B)(ii) (challenging academic assessments for children with and without disabilities must assess

whether "the student is performing *at the student's grade level*" (emphasis added)).

2. The Department of Education – whose Office of Special Education Programs Congress has charged with "administering and carrying out" the IDEA, 20 U.S.C. § 1402(a) – agrees. The Department's regulations explain that schools must adapt instruction to ensure "that [a child with a disability] can meet the educational standards" that "apply to *all* children." 34 C.F.R. § 300.39(b)(3) (emphasis added).

In a recent guidance document addressed to state and local education officials regarding the meaning of FAPE, the Department elaborated on this directive. "Research has demonstrated," the Department explained, "that children with disabilities who struggle in reading and mathematics can successfully learn grade-level content and make significant academic progress when appropriate instruction, services, and supports are provided." U.S. Dep't of Educ., Dear Colleague Letter: Clarification of FAPE and Alignment with State Academic Standards 1 (Nov. 16, 2015) ("Dear Colleague Letter"), http://1.usa.gov/1MkxyAE. Generally speaking, therefore, "IEP goals must be aligned with grade-level content standards for all children with disabilities." *Id.* This emphasis on grade-level achievement means that children with disabilities must "receive high-quality instruction that will give them the opportunity to meet the State's challenging academic achievement standards and prepare them for college, careers and independence." *Id.* at 4.

3. Finally, the "substantially equal opportunity" standard has the flexibility necessary to be administered effectively on the ground.

a. As we have emphasized, the free appropriate public education required by the IDEA must be "tailored to the unique needs of" children with disabilities through each child's IEP. *Rowley*, 458 U.S. at 181; *see also supra* 24-25. Accordingly, the "substantially equal opportunity" standard does not require school districts to provide identical services to all children, even those who share the same or similar disabilities. The particular personalities, needs, and capabilities of each child determine what sorts of educational and related services are "appropriate."

Similarly, the Department of Education has explained that "there is a very small number of children with the most significant cognitive disabilities" for whom seeking grade-level achievement is unrealistic. Dear Colleague Letter, *supra*, at 5. For these students, performance may be measured against alternative achievement standards, so long as they are "clearly related to grade-level content." *Id.* Although "annual IEP goals for these children [must] reflect high expectations," their academic goals "may be restricted in scope or complexity or take the form of introductory or pre-requisite skills." *Id.*; *see also supra* 27-28.[10]

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[10] The Department of Education's understanding that only "a very small number" of children with disabilities have the most significant cognitive disabilities is fully consistent with Congress's expectations. *See* 20 U.S.C. § 6311(b)(2)(D)(i)(I)

Likewise, when a child who has fallen behind by several grade levels on certain educational goals, it might be unrealistic (and, thus, not statutorily required) for an IEP to seek immediate elevation to grade level with respect to those goals. *See* Dear Colleague Letter, *supra*, at 5-6. This could occur, for instance, if the child's disability created unusual difficulties in one facet of knowledge acquisition. *See id.* (providing example). It would be consistent with the "substantially equal opportunity" standard to take a more measured approach to educational advancement in that type of situation, just as it might for a student without disabilities who has fallen behind significantly. Of course, if children with disabilities begin their education in a school operating under the proper FAPE standard, it is less likely that they will fall behind in the first place.

In sum, precisely because every child's needs are different, and because the IDEA designates parents and educators, working together, to craft each child's IEP, 20 U.S.C. § 1414(d)(1)(B), the "substantially equal opportunity" standard does not usurp the role of educators or parents in tailoring particular special education services to particular situations.

b. In the infrequent situations where FAPE disputes result in lawsuits, *see supra* at 4, the "substantially equal opportunity" formula similarly avoids inviting courts to presume they have more educational expertise than school districts.

(States must ensure that, for each subject-matter assessment, no more than one percent of the total number of students assessed use alternative assessments).

In *Rowley*, this Court explained that the IDEA should not be construed as a license for courts "to substitute their own notions of sound educational policy for those of the school authorities which they review." 458 U.S. at 206. Accordingly, the federal courts assess the adequacy of IEPs under a system of "modified de novo" review, which gives "due weight" to school districts' expertise and administrative findings. *S.H. v. State-Operated Sch. Dist.*, 336 F.3d 260, 270 (3d Cir. 2003) (collecting and agreeing with law of other circuits); *see also* Pet. App. 6a-7a.

The standard of review courts should apply when assessing the adequacy of IEPs is not at issue here. The "substantially equal opportunity" test simply describes the level of education schools must strive to deliver. Once that legal requirement is established, courts can continue to use the modified de novo standard of review that prevails in the lower courts – or whatever other standard is most fitting – to resolve the disputes over whether school districts have discharged their duty to provide a substantially equal opportunity to succeed.

c. Lastly, it bears emphasis that providing a child a FAPE "is not guaranteed to produce any particular outcome" for any particular child, S. Rep. No. 94-168, at 11 (1975), any more (or any less) than educational outcomes can be guaranteed for children without disabilities. *See Rowley*, 458 U.S. at 210-11 (Blackmun, J., concurring in the judgment). Rather, providing a FAPE is about the public schools' obligation to implement the IDEA's "goal of providing full educational *opportunity* to all children with disabilities." 20 U.S.C. § 1412(a)(2) (emphasis added).

While the FAPE requirement does not promise particular results, it does require an IEP that is reasonably calculated to provide a child with a disability a substantially equal opportunity to succeed. And when the schools aim high, they are much more likely to land high, which is what Congress sought when it conditioned funding for special education on the states' undertaking an obligation to provide children with disabilities a free appropriate public education.

CONCLUSION

The judgment of the court of appeals should be reversed. Because the School District provided educational instruction and related services that barely satisfied a "merely more than de minimis" standard, *see* Pet. App. 23a, it follows that the School District failed to provide petitioner a FAPE. At a minimum, the case should be remanded for application of the correct FAPE standard.

Respectfully submitted,

Jeffrey L. Fisher
David T. Goldberg
Pamela S. Karlan
SUPREME COURT
LITIGATION CLINIC
William S. Koski
YOUTH AND EDUCATION
LAW PROJECT
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, CA 94305

Jack D. Robinson
Counsel of Record
SPIES, POWERS &
ROBINSON, P.C.
950 South Cherry Street
Suite 700
Denver, CO 80246
(303) 830-7090
robinson@sprlaw.net

Brian Wolfman
Wyatt G. Sassman
GEORGETOWN LAW
APPELLATE COURTS
IMMERSION CLINIC
600 New Jersey Ave., NW
Washington, DC 20001

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No. 15-827

IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF FOR RESPONDENT

W. STUART STULLER
CAPLAN AND EARNEST LLC
1800 Broadway, Suite 200
Boulder, CO 80302

DANIEL D. DOMENICO
KITTREDGE LLC
3145 Tejon St., #D
Denver, CO 80211

WILLIAM E. TRACHMAN
DOUGLAS COUNTY
SCHOOL DISTRICT RE-1
620 Wilcox St.
Castle Rock, CO 80104

NEAL KUMAR KATYAL
Counsel of Record
FREDERICK LIU
EUGENE A. SOKOLOFF
MITCHELL P. REICH*
HOGAN LOVELLS US LLP
555 Thirteenth St., NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

*Admitted only in New York; supervised by members of the firm

Counsel for Respondent

(202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*?

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IN THE

Supreme Court of the United States

No. 15-827

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF FOR RESPONDENT

INTRODUCTION

This Court answered the question presented 34 years ago. It held that the Individuals with Disabilities Education Act (IDEA) does not contain "any substantive standard prescribing the level of education to be accorded" children with disabilities. *Bd. of Educ.* v. *Rowley*, 458 U.S. 176, 189 (1982). It concluded that the Act instead contains a straightforward requirement: that the individualized education program (IEP) of personalized instruction and supportive services the statute mandates for each child be reasonably calculated to confer "some educational benefit." *Id.* at 200.

That decision was correct. Congress enacted the IDEA pursuant to the Spending Clause; as a condition of receiving federal funds, States are required to provide such services "as may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26). Congress did not think any further substantive standard was necessary to ensure that children with disabilities get a quality education. Rather, it sought to achieve that ambitious aim principally through a comprehensive, finely reticulated scheme of procedural requirements and systemic policies. The Court cannot surprise participating States by superimposing on this scheme a substantive condition of which they had no notice.

Petitioner and the Government nonetheless ask this Court to fashion a sweeping new standard, advanced for the first time in their merits briefs in this case. But even they cannot agree what that standard should be: Petitioner contends (at 40) the Act requires that an IEP be designed to provide educational "opportunities" "substantially equal to the opportunities afforded children without disabilities," while the Government says (at 17) the Act mandates an IEP that provides "an opportunity to make significant progress." Petitioner's *amici* offer still other, conflicting tests. No State agreed to these requirements when it accepted IDEA funds, and the Court cannot adopt any of them without overruling *Rowley*. This Court should apply *stare decisis* and enforce the Act as written.

STATUTE INVOLVED

Key provisions of the IDEA are reprinted in the joint appendix. J.A. 21-111.

STATEMENT

A. Statutory Background

Congress enacted the IDEA pursuant to the Spending Clause. *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 295 (2006). The Act offers States a deal: If a State "compli[es] with [the statute's] extensive goals and procedures," then it is entitled to receive "federal funds to assist * * * in educating children with disabilities." *Id.* (internal quotation marks omitted). To hold up its end of the bargain, a State must satisfy 25 express conditions. *See* 20 U.S.C. § 1412(a).

1. a. The Act's principal funding condition is the requirement that each participating State make available a "free appropriate public education," or FAPE, "to all children with disabilities residing in the State between the ages of 3 and 21." *Id.* § 1412(a)(1). The Act defines "free appropriate public education" to mean "special education and related services that" meet four specified requirements. *Id.* § 1401(9). "Special education" is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability." *Id.* § 1401(29). And "related services" means "transportation, and such developmental, corrective, and other supportive services * * * as may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26).

The Act also describes each of the four requirements a child's special education and related services must satisfy to constitute a FAPE. First, the education and services must be "provided at public expense, under public supervision and direction, and without charge." *Id.* § 1401(9)(A). Second, they must

"meet the standards of the State educational agency," *id.* § 1401(9)(B), meaning that States must, as a matter of federal law, abide by any educational requirements they have set for children with disabilities. Third, the education and services must "include an appropriate preschool, elementary school, or secondary school education in the State involved." *Id.* § 1401(9)(C). That means that children with disabilities must be schooled at "approximate[ly] the grade levels used in the State's regular education." *Rowley*, 458 U.S. at 176. Fourth, and most critically, a child's special education and related services must be "provided in conformity with the individualized education program," or IEP, "required under section 1414(d)." 20 U.S.C. § 1401(9)(D); *see id.* § 1412(a)(4).

The IEP is the "centerpiece" of the Act. *Honig* v. *Doe*, 484 U.S. 305, 311 (1988). Schools must follow an "extensive" process in developing an IEP for each child with a disability. *Rowley*, 458 U.S. at 189. At the start, the school must "conduct a full and individual initial evaluation" of the child to determine the nature of his disability and any related needs. 20 U.S.C. § 1414(a)(1)(A); *see id.* §§ 1412(a)(7), 1414(b)-(c). The school must then assemble an "IEP Team" composed of the child's parents, his teachers, and educational experts, *id.* § 1414(d)(1)(B), to "consider" the results of the evaluation, "the strengths of the child," "the concerns of the parents," and the child's "academic, developmental, and functional needs," among other factors. *Id.* § 1414(d)(3)(A).

After conducting that review, the IEP Team must draft an IEP that satisfies a detailed checklist of requirements. The broad outlines of that checklist have remained roughly the same since 1975. *See Rowley*, 458 U.S. at 182 (quoting 20 U.S.C.

§ 1401(19) (1976 & Supp. IV)). Each IEP must contain a statement of the child's present levels of performance, his annual goals, and the educational services to be provided him, among other things. 20 U.S.C. § 1414(d)(1)(A)(i). Pursuant to the Act's "[l]east restrictive environment" requirement, the IEP must also ensure that, "[t]o the maximum extent appropriate," the child is "educated with children who are not disabled." *Id.* § 1412(a)(5)(A).

In 1997 and 2004, Congress added considerable detail to this checklist. *See* IDEA Amendments of 1997, Pub. L. No. 105-17, sec. 101, § 614(d)(1)(A), 111 Stat. 37, 83-85; Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, sec. 101, § 614(d)(1)(A), 118 Stat. 2647, 2707-2709. Today, in assessing the child's "present levels," the IEP Team must take into account his "academic achievement and functional performance." 20 U.S.C. § 1414(d)(1)(A)(i)(I). In setting the child's annual goals, the IEP Team must consider what would enable him to "be involved in and make progress in the general education curriculum" and "meet each of [his] other educational needs." *Id.* § 1414(d)(1)(A)(i)(II). And in developing the child's "special education and related services," the IEP Team must consider—"based on peer-reviewed research to the extent practicable"—what would allow him "to advance appropriately toward attaining the annual goals," "to be involved in and make progress in the general education curriculum," and "to be educated and participate with other children" in school activities. *Id.* § 1414(d)(1)(A)(i)(IV). Starting when a child is 16, his IEP must also contain "appropriate measurable postsecondary goals" and a statement of the "transition services

* * * needed to assist [him] in reaching" them. *Id.* § 1414(d)(1)(A)(i)(VIII).

If parents believe a school has failed to provide their child a FAPE, they may file a due process complaint with the state educational agency. *Id.* § 1415(b)(6). If the dispute cannot be resolved consensually, an impartial hearing officer conducts a hearing concerning the parent's claim; should the officer determine that the child was denied a FAPE, the officer may award a broad range of relief. *Id.* § 1415(f)(1), (f)(3)(E), (i)(2)(C)(iii); *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 244 n.11 (2009). Any "party aggrieved" by a hearing officer's decision may seek review in state or federal court. 20 U.S.C. § 1415(i)(2)(A).

b. This Court first considered the meaning of the Act's FAPE requirement in *Board of Education* v. *Rowley*. In that decision, the Court explained that a State's obligation to provide a FAPE is twofold. First, a State must "compl[y] with the *procedures* set forth in the Act," by following the detailed process the Act prescribes for developing an IEP. *Rowley*, 458 U.S. at 206-207 & n.27 (emphasis added). Second, the resulting IEP must be "reasonably calculated to enable the child to receive educational benefits." *Id.* at 207. The IEP, the Court explained, need not provide any particular "level of education." *Id.* at 189. So long as it is designed to provide "*some* educational benefit," the Act's substantive standard is satisfied. *Id.* at 200 (emphasis added).

2. In addition to the FAPE requirement, the Act contains an array of *systemic* conditions that States must satisfy to receive federal funds. For instance, each State must set a state-wide "goal of providing

full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal." 20 U.S.C. § 1412(a)(2). Each State must establish "goals for the performance of children with disabilities" that "are the same as the State's long-term goals" under the Elementary and Secondary Education Act of 1965 (ESEA). *Id.* § 1412(a)(15)(A). And each State must set adequate qualifications for special-education personnel, *id.* § 1412(a)(14), ensure access to instructional materials for the blind, *id.* § 1412(a)(23), and prohibit mandatory medication, *id.* § 1412(a)(25), among many other things.

The Department of Education polices States' efforts to satisfy these systemic requirements. Each State must submit a plan to the Department assuring that it "has in effect policies and procedures" to meet each condition. *Id.* § 1412(a). Pursuant to a 2004 amendment to the Act, States also must submit "performance plan[s]" setting "measurable and rigorous targets" for improvement and performance reports detailing their progress. *Id.* § 1416(b)(2)(A), (C)(ii). If the Department determines that a State is not "meet[ing] the requirements and purposes of [the Act]," the Department may order it to reallocate federal funds or impose other funding conditions. *Id.* § 1416(d)(2)(A)(i), (e)(1)-(2). If a State remains in continual noncompliance, the Department can cut off federal funds in whole or in part. *Id.* § 1416(e)(2)(B)(iii)-(v), (3)(B).

B. Procedural History

1. Petitioner Endrew F. ("Drew") is a child with a diagnosis of autism and attention deficit/hyperactivity disorder. Pet. App. 3a. These conditions affect

his "cognitive functioning, language and reading skills, and his social and adaptive abilities." *Id.* Drew attended schools in the Douglas County School District from preschool through the fourth grade, and received special education and related services under a series of IEPs. *Id.* at 3a-4a.

Drew's preschool and kindergarten years "went well," and he made academic progress through the first and second grades. *Id.* at 61a, 63a. In the second grade, however, Drew's "behavioral problems began increasing," leading his IEP Team to institute a behavioral intervention plan (BIP). *Id.* at 63a.

Drew's third-grade IEP nearly tripled the amount of time he spent either in a significant-support-needs classroom or with a paraprofessional aide to 33.5 hours total, and added the services of a mental-health professional and speech-language therapist. Supp. J.A. 39sa, 73sa. Although Drew "ma[de] progress towards some of [his] goals and objectives," his behavior "beg[a]n to interfere with [his] educational opportunities." Pet. App. 65a. Drew's fourth-grade IEP included a new BIP, designed to help him function better in his general-education classroom. Supp. J.A. 117sa-119sa.

Drew's IEP Team met again in April 2010 to design an IEP for the upcoming fifth-grade year. Pet. App. 67a. Drew's fifth-grade IEP called for more hours in the significant-support-needs classroom or with his paraprofessional aide. Supp. J.A. 109sa, 142sa. Because "[e]veryone" at the meeting agreed "that a new BIP was needed and that an autism specialist should be part of the team," the team agreed to reconvene on May 10, 2010. Pet. App. 68a. But Drew's parents never attended that meeting. In-

stead, on May 1, they notified the school district that they were enrolling Drew at Firefly Autism House, a private school specializing in educating children with autism. *Id.* at 29a, 68a-69a.

2. In February 2012, Drew's parents filed a due process complaint with the Colorado Department of Education seeking reimbursement for the cost of sending Drew to Firefly, where tuition approached $70,000 per year. J.A. 16-20; 2 C.A. App. 72; *see* 20 U.S.C. § 1412(a)(10)(C)(ii). They claimed that Drew had "stopped making progress in his first grade year," and that his fifth-grade IEP "was not substantively different than the IEPs that had failed to provide [him] an appropriate education in the past." J.A. 18-19.

After a three-day hearing featuring arguments from counsel for both sides and testimony from a number of witnesses, a state administrative law judge (ALJ) denied the parents' claims. Pet. App. 47a-49a, 59a-85a. The ALJ concluded that the fifth-grade IEP discharged the school district's obligation to provide a FAPE because the IEP was "reasonably calculated for [Drew] to receive educational benefit." *Id.* at 84a.

3. Drew's parents then filed suit in federal court challenging the ALJ's decision. *Id.* at 33a. After "independently review[ing]" the administrative record, the District Court upheld the ALJ's determination. *Id.* at 38a (internal quotation marks omitted); *see id.* at 41a-49a.

The Tenth Circuit affirmed. *Id.* at 2a. The court explained that it had "long subscribed to the *Rowley* Court's 'some educational benefit' language," which it interpreted to mean that a child's IEP must be

reasonably calculated to offer a "more than *de minimis*" educational benefit. *Id.* at 15a-16a (internal quotation marks omitted). The court noted that this determination must be made "as of the time [an IEP] is offered to the student"; "[n]either the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." *Id.* at 21a (internal quotation marks omitted). Applying that standard, the court concluded that "the IEP rejected by [Drew's] parents" was "substantively adequate," as demonstrated by Drew's "progress towards his academic and functional goals on his IEPs * * * during the time he was enrolled in the District." *Id.* at 22a-23a.

The Tenth Circuit denied rehearing en banc. *Id.* at 86a. This Court granted certiorari.

SUMMARY OF ARGUMENT

I. In *Rowley*, this Court held that States provide a "free appropriate public education" to children with disabilities when they offer special education and related services that are "reasonably calculated" to "confer some educational benefit." 458 U.S. at 200, 207. This Court should not abandon that interpretation in favor of alternatives *Rowley* itself rejected.

Rowley dismissed petitioner's "substantially equal opportunity" standard, Pet. Br. 50—lifted straight from Justice Blackmun's separate opinion—as "entirely unworkable" and inconsistent with congressional intent. 458 U.S. at 198; *see id.* at 210-211 (Blackmun, J., concurring in the judgment). And it foreclosed the Government's contention that the Act requires "an opportunity to make significant educational progress," U.S. Br. 6-7, by holding that the Act does not "prescrib[e] the level of education to be

accorded handicapped children." *Rowley*, 458 U.S. at 189 (majority opinion). The Court likewise declined to read the word "appropriate" to impose any substantive standard, concluding that the legislative history "unmistakably disclose[d]" that "an 'appropriate education' is provided when *personalized* educational services are provided"—nothing more. *Id.* at 197 (emphasis added).

The other side's efforts to recharacterize *Rowley* lack merit. No member of the Court thought *Rowley* left interpreting the Act's substantive standard for another day. Nor did anyone think the Court's isolated reference to providing "meaningful" "access" to public education tacitly reversed the Court's conclusion that the Act was not intended to "guarantee any particular level of education." *Id.* at 192. Rather, every Justice understood the Court to hold that access is meaningful where it is "sufficient to confer some educational benefit." *Id.* at 200; *see id.* at 214 (White, J., dissenting).

Stare decisis requires preserving *Rowley*'s decades-old construction of a Spending Clause statute—an interpretation Congress left untouched through two re-enactments of the Act and on which the States have justifiably relied.

II. If *stare decisis* did not decide this case, the statute's text and structure would. As legislation passed under the Spending Clause, the IDEA must set out its conditions "'unambiguously,'" placing state officials on "clear notice" of their obligations. *Arlington*, 548 U.S. at 296 (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Yet petitioner and the Government cannot agree themselves on just what the Act requires. And their

attempt to ground their divergent standards in the word "appropriate" abandons the Act's own definitions in favor of tenuous inferences from broadly worded congressional findings. No reasonable state official reading what the statute actually says could be on "clear notice" of the standards petitioner and the Government would have this Court impose.

Rowley's "some educational benefit" standard, by contrast, is firmly rooted in the text and consistent with the IDEA's purposes. The statutory definition of a FAPE incorporates the requirement that a State provide "supportive services" that "assist a child * * * *to benefit from* special education." 20 U.S.C. § 1401(26) (emphasis added); *see id.* § 1401(9). Any state official would understand this language to require that IEPs be calculated to confer "some" benefit greater than *de minimis*. *Rowley*, 458 U.S. at 200-201.

Nor is that all the Act requires of participating States. Every IEP results from a statutorily mandated process designed to "maximize parental involvement" and ensure "individualized consideration of and instruction for each child." *Id.* at 182 & n.6, 189. And Congress has elaborated and refined the comprehensive list of items that process must address. 20 U.S.C. § 1414(d). Together, these requirements "assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley*, 458 U.S. at 206. And they are accompanied by ambitious state-wide goals, enforceable by the Department of Education through funding cutoffs. 20 U.S.C. § 1416(e)(2)-(3). No state official encountering these provisions could conclude that it was "perfectly fine to aim low." U.S. Br. 36.

III. The other side's protean proposals would strain the competence of courts. Petitioner calls for the same "impossible measurements and comparisons" *Rowley* warned would be "entirely unworkable." 458 U.S. at 198. And the Government articulates no principled distinction between what progress is "significant" and what is not. Neither petitioner nor the Government plausibly explains how courts could apply these standards without straying into educational policy disputes they "lack the specialized knowledge and experience necessary to resolve." *Id.* at 208 (internal quotation marks omitted). This is the case in point: Neither petitioner nor the Government says what, under their standards, petitioner's fifth-grade IEP ought to have said. And if they cannot say, it is hard to imagine how a court could.

The only workable standard is the one *Rowley* prescribes and that circuits have applied for decades. That test requires courts to ensure that a child's IEP is reasonably calculated to provide that child some benefit. These are the kinds of commonsense, record-based judgments courts are well equipped to make. The Court should not impose a different standard now.

ARGUMENT

I. *ROWLEY* DEFINITIVELY ANSWERED THE QUESTION PRESENTED

A. *Rowley* Adopted A "Some Educational Benefit" Standard

Petitioner asks this Court to decide what "level of educational benefit" an IEP must aim to provide to satisfy the IDEA's FAPE requirement. Pet. i. The Court answered that question 34 years ago in *Rowley*.

Rowley held that the IDEA does not impose "any substantive standard prescribing the level of education to be accorded" children with disabilities. 458 U.S. at 189. The Court explained that, as a Spending Clause statute, the Act could not "impose [a] burden upon the States unless it d[id] so unambiguously." *Id.* at 190 n.11; *see id.* at 204 n.26. Yet a "substantive standard prescribing the level of education" was "[n]oticeably absent from the language of the statute." *Id.* at 189. Rather, the "definitions contained in the Act" provided that "a 'free appropriate public education' consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Id.* at 188-189. And, "[a]lmost as a checklist for adequacy," the Act specified a series of additional requirements, including that the special education and related services be free, that they meet state standards, that they "approximate the grade levels used in the State's regular education," and that they "comport with the child's IEP." *Id.* at 189. "[T]he face of the statute" thus "evinces a congressional intent *** to require the States to adopt *procedures* which would result in individualized consideration of and instruction for each child." *Id.*

The legislative history merely "confirm[ed]" that Congress did not mean to "guarantee any particular level of education." *Id.* at 191-192. "Neither" of the two federal-court decisions that "became the basis of the Act" "purport[ed] to require any particular substantive level of education." *Id.* at 193-194 & n.15. And the Senate and House Reports made clear that "an 'appropriate education' is provided when person-

alized educational services are provided." *Id.* at 197. Although the Rowleys argued that "the goal of the Act is to provide each handicapped child with an equal educational opportunity," *id.* at 198, the Court explained that "Congress' desire to provide specialized educational services, even in furtherance of 'equality,' cannot be read as imposing any particular substantive educational standard upon the States." *Id.* at 200.

Still, the Court recognized that "the education to which access is provided" must "be sufficient to confer *some* educational benefit." *Id.* (emphasis added). After all, the statutory definition of a FAPE requires States to offer services sufficient to permit a child "*to benefit* from special education." *Id.* at 201. An IEP designed so that the child could "receive *no* benefit" would violate that textual command. *Id.* (emphasis added). So while an IEP need not promise any particular *level* of benefit, it must be "reasonably calculated" to provide *some* benefit, as opposed to *none*. *Id.* at 207.

The Court then turned to how the "some educational benefit" standard would be applied in individual cases. The Court recognized that "[t]he Act requires participating States to educate a wide spectrum of handicapped children," with vastly different needs and capabilities. *Id.* at 202. While "[o]ne child may have little difficulty competing successfully in an academic setting with nonhandicapped children," another "may encounter great difficulty in acquiring even the most basic of self-maintenance skills." *Id.* A program calculated to confer a benefit on one child might offer only a *de*

minimis benefit to another—and a *de minimis* benefit is no benefit at all.[1] The Court therefore did "not attempt * * * to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* Instead, it "confine[d]" its application of the standard to the case before it. *Id.*

The Court concluded by observing that the Act's "elaborate and highly specific procedural safeguards" "demonstrate[] the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Id.* at 205-206. It cautioned judges not to "substitute their own notions of sound educational policy for those of the school authorities which they review." *Id.* at 206. Rather, in suits alleging the denial of a FAPE, a court was to proceed in two steps: "First, has the State complied with the procedures set forth in the Act," including "creat[ing] an IEP * * * which conforms with the [statutory] requirements"? *Id.* at 206 & n.27. And, second, is the

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[1] The vast majority of the federal courts of appeals over the last three decades have equated some benefit with a "more than *de minimis*" or "nontrivial" benefit. *See, e.g.*, *O.S.* v. *Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015); *D.B. ex rel. Elizabeth B.* v. *Esposito*, 675 F.3d 26, 34 (1st Cir. 2012); *K.E. ex rel. K.E.* v. *Indep. Sch. Dist. No. 15*, 647 F.3d 795, 810 (8th Cir. 2011); *P. ex rel. Mr. & Mrs. P.* v. *Newington Bd. of Educ.*, 546 F.3d 111, 119 (2d Cir. 2008); *Thompson R2-J Sch. Dist.* v. *Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1149 (10th Cir. 2008); *Todd* v. *Duneland Sch. Corp.*, 299 F.3d 899, 905 n.3 (7th Cir. 2002); *Cypress-Fairbanks Indep. Sch. Dist.* v. *Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997); *JSK ex rel. JK* v. *Hendry Cty. Sch. Bd.*, 941 F.2d 1563, 1572-1573 (11th Cir. 1991).

resulting IEP "reasonably calculated to enable the child to receive educational benefits"? *Id.* at 207. If the answer to both questions is "yes," the State "has complied with the obligations imposed by Congress and the courts can require no more." *Id.*

B. Neither Petitioner's Nor The Government's Standard Can Be Reconciled With *Rowley*

Petitioner and the Government each ask this Court to supplant *Rowley*'s "some educational benefit" standard with a new substantive requirement, advanced for the first time in their merits-stage briefing. Adopting either standard would require overruling *Rowley*.

1. To begin, *Rowley* rejected the very arguments petitioner and the Government make here.

a. Petitioner contends that a FAPE means "an education that aims to provide a child with a disability opportunities * * * that are *substantially equal* to the opportunities afforded children without disabilities." Pet. Br. 40 (emphasis added). Petitioner appears to have lifted that standard straight from Justice Blackmun's separate opinion in *Rowley*. Breaking from his colleagues in the majority, Justice Blackmun argued that "the relevant question" was "not, as the Court says," whether a child's IEP is "reasonably calculated to enable [her] to receive educational benefits," but "[r]ather" whether it offers her "an opportunity to understand and participate in the classroom that [i]s *substantially equal* to that given her nonhandicapped classmates." 458 U.S. at 211 (Blackmun, J., concurring in the judgment) (emphasis added); *see also id.* at 215 (White, J., dissenting) (arguing similarly that children should

be "given an equal opportunity to learn if that is *reasonably possible*" (emphasis added)). There is a reason petitioner's test appears only in Justice Blackmun's opinion: It failed.

Indeed, the Court devoted an entire section of its opinion to rejecting any standard based on equality of opportunity. *See id.* at 198-200 (majority opinion). Requiring States to provide "'equal' educational opportunities," it said, would "present an entirely unworkable standard requiring impossible measurements and comparisons." *Id.* at 198. The very concept of a "free appropriate public education," the Court explained, is "too complex to be captured by the word 'equal' whether one is speaking of opportunities or services." *Id.* at 199. The Court therefore concluded that Congress's interest in "equality" could not "be read as imposing any particular substantive standard upon the States." *Id.* at 200.

Attempting to cast *Rowley* in a different light, petitioner (at 30) says the Court held only that the Act does not require "higher levels of achievement for children with disabilities than for children without disabilities." That is simply not true. What the Rowleys advocated—and what the Court categorically rejected—was any requirement that States "maximize the potential of each handicapped child *commensurate with the opportunity provided nonhandicapped children*." 458 U.S. at 200 (emphasis added); *see id.* at 189-190, 198; Resp. Br. 17, *Rowley*, *supra* (arguing that a FAPE is "an education that provides Amy Rowley with an equal educational opportunity," and that "the school district is not required to guarantee her any particular level of achievement").

And nothing in the Court's reasoning suggests—as petitioner would have it (at 42)—that *Rowley* forecloses only "*strict* equality of opportunity." The Court's reasoning makes clear that *Rowley* rejected *any* standard based on equality of opportunity. That is, after all, why Justice Blackmun could not join the Court's opinion, even though his test—like petitioner's—contained the qualifier "substantially."

b. For its part, the Government contends (at 17) that "an education is 'appropriate' when it provides the child with an opportunity to make significant progress in light of his capabilities." But *Rowley* could hardly have been clearer in explaining that the Act contains no "substantive standard prescribing the level of education to be accorded handicapped children," 458 U.S. at 189, and was not intended to "guarantee any particular level of education," *id.* at 192. *Rowley* thus forecloses any standard based on a particular level of progress.

c. *Rowley* also forecloses the textual basis on which the other side rests their standards. Both petitioner (at 16) and the Government (at 17) argue that the word "appropriate" in "free appropriate public education" should be read expansively in light of the IDEA's purposes to contain a broad substantive requirement. The Rowleys made virtually the same argument, down to citing the same dictionary definition of "appropriate" as "specially suitable." Resp. Br. 30, *Rowley*, *supra* (citing *Webster's*).

The Court flatly disagreed. It canvassed the legislative history and concluded that "Congress * * * equated an 'appropriate education' to the receipt of some *specialized* educational services." *Rowley*, 458 U.S. at 195 (emphasis added). That is, "an 'appro-

priate education' is provided when *personalized* educational services are provided." *Id.* at 197 (emphasis added). The Court thus declined to read "appropriate" in light of the Act's purposes, *see id.* at 190 n.11, or as "concisely express[ing]" the standard the Rowleys advocated, *id.* at 197 n.21.

2. The other side's attempts to find a foothold for their standards in *Rowley* are unavailing.

Petitioner (at 31-32) and the Government (at 13-14) claim that *Rowley* left the door open to their novel standards by refusing to "establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." 458 U.S. at 202. But the Court squarely rejected "any substantive standard prescribing the level of education to be accorded" children with disabilities; it did not leave that issue for another day. *Id.* at 189. Not even Justice Blackmun or the dissent thought the question remained open. *See id.* at 211 (Blackmun, J., concurring in the judgment); *id.* at 214 (White, J., dissenting). The Court's reluctance to "establish any one test" simply reflects the understanding that whether a child's IEP is reasonably calculated to confer a benefit will depend on individual circumstances—a proposition no one disputes. *See* Pet. Br. 48; U.S. Br. 25.

Nor is there any merit to petitioner's and the Government's reliance on *Rowley*'s unremarkable observation that advancing grade-to-grade can be "one important factor in determining educational benefit" where a child "is being educated in the regular classrooms of a public school system." 458 U.S. at 207 n.28; *see* Pet. Br. 30; U.S. Br. 14. In making that observation, *Rowley* meant merely to help courts

decide cases in which the "'mainstreaming' preference of the Act has been met": When "a child is being educated in the regular classrooms," the "grading and advancement system" can provide a simple answer to the otherwise "difficult problem" of measuring the benefit conferred by the child's IEP. 458 U.S. at 202-203. *Rowley*'s application of its "some educational benefit" standard to children who have been mainstreamed should not be mistaken for the standard itself.

Finally, petitioner (at 30-31) and the Government (at 14-16, 33) attempt to ground their standards in *Rowley*'s use of the word "meaningful." Their arguments rest on a single passage in the Court's opinion: "By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such *access* meaningful." 458 U.S. at 192 (emphasis added).

The other side fails to acknowledge that *Rowley* went on to explain exactly what "meaningful" "access" entails. *Id.* It held that the Act requires only "that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Id.* at 200. Or, in the dissent's paraphrase of the Court's holding: Amy Rowley "receiv[ed] a meaningful and therefore appropriate education" because she "was provided with *some* specialized instruction from which she obtained *some* benefit and because she passed from grade to grade." *Id.* at 214 (White, J., dissenting). The Court has since confirmed that reading, explicitly distinguishing "meaningful access to the public schools" from

"the level of education that a school must finance once access is attained." *Cedar Rapids Cmty. Sch. Dist.* v. *Garret F.*, 526 U.S. 66, 79 (1999). That eviscerates petitioner's attempt (at 30) to link "meaningful" access to grade advancement. And it refutes the Government's contention (at 15) that "meaningful" access is "best read as another way of saying that States must give children the opportunity to make significant educational progress."

C. *Stare Decisis* Requires Adherence to *Rowley*

Although *Rowley* is controlling, neither petitioner nor the Government can bring themselves to ask this Court to overrule it. That would be a tall order. While "any departure from" *stare decisis* "demands special justification," four factors converge to endow *Rowley*'s holding with unusual durability. *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014) (internal quotation marks omitted).

First, *stare decisis* "carries enhanced force" in statutory interpretation cases. *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015); *see also Cedar Rapids*, 526 U.S. at 78 n.10 (applying heightened *stare decisis* to the Court's prior interpretation of the IDEA). That is because "Congress can correct any mistake it sees" in the Court's "interpretive decisions." *Kimble*, 135 S. Ct. at 2409. Congress has repeatedly done just that, swiftly amending the IDEA to correct interpretations with which it disagreed. *See* Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, sec. 103, 104 Stat. 1103, 1106 (overturning *Dellmuth* v. *Muth*, 491 U.S. 223 (1989)); Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, secs. 2-3, 100

Stat. 796, 796-797 (overturning *Smith* v. *Robinson*, 468 U.S. 992 (1984)).

Second, *stare decisis* is all the stronger here because two Congresses have re-enacted the Act *without* altering the words construed in *Rowley*. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647; IDEA Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37; *Forest Grove*, 557 U.S. at 239-240 ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." (internal quotation marks omitted)). Though petitioner and the Government are correct that these amendments reflect Congress's desire to achieve better outcomes for children with disabilities, "Congress implemented [those] higher expectations in specific ways, and altering the standard for providing a FAPE was not one of them." *O.S.* v. *Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015); *see also Thompson R2-J Sch. Dist.* v. *Luke P., ex rel. Jeff P.*, 540 F.3d 1143, 1149 n.5 (10th Cir. 2008) (noting that "the same textual language" *Rowley* interpreted "has survived to today's version of IDEA"). States have thus continued to accept federal funds on the understanding that *Rowley* is good law. *See Forest Grove*, 557 U.S. at 246 (concluding that States were placed "on notice" of the meaning of an IDEA provision by a prior construction ratified by Congress). And "Congress's continual reworking of the [IDEA]"—but not of *Rowley*'s standard—"further supports leaving the decision in place." *Kimble*, 135 S. Ct. at 2410.

Third, "considerations favoring *stare decisis* are at their acme" in cases involving contract rights "be-

cause parties are especially likely to rely on such precedents when ordering their affairs." *Id.* (internal quotation marks omitted). Spending Clause legislation "is much in the nature of a contract." *Arlington*, 548 U.S. at 296 (internal quotation marks omitted). In exchange for federal funding, States have made numerous fixed investments in their education systems in reliance on the *Rowley* standard. Overruling *Rowley* would alter the terms of that decades-old bargain.

Fourth, the reliance interests at stake are not just any reliance interests; they are interests that implicate the division of federal-state power. Under our federal system, the "formulation and execution of educational policy" is a matter traditionally committed to the States. *Rowley*, 458 U.S. at 208 n.30. By subjecting some aspects of education policy to federal standards in exchange for funding, the IDEA shifts some of that power to the Federal Government. Revising the statute's core requirement would thus implicate the ordering of political as well as economic affairs.

Against this, petitioner and the Government offer little more than "retreads of assertions [this Court] rejected before." *Bay Mills*, 134 S. Ct. at 2037. "The [*Rowley*] majority did not find th[ese] argument[s] persuasive then," and petitioner and the Government give the Court "no new reason to endorse [them] now." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2409 (2014).

II. THE IDEA REQUIRES STATES TO PROVIDE "SOME EDUCATIONAL BENEFIT" TO CHILDREN WITH DISABILITIES

Rowley is not just controlling; it is also correct. The IDEA nowhere contains the standards petitioner and the Government propose, let alone puts any State on clear notice that they exist. By contrast, *Rowley*'s "some educational benefit" standard is a straightforward application of the Act's requirement that children receive the services they need "to benefit from special education," 20 U.S.C. § 1401(26), and it accords with both the Act's purpose and the comprehensive scheme Congress enacted to fulfill it.

A. The IDEA's Obligations Must Be Unambiguous

The proper starting point for determining what the Act requires is "the fact that Congress enacted the IDEA pursuant to the Spending Clause." *Arlington*, 548 U.S. at 295. As the Court has time and again explained, Spending Clause statutes are "much in the nature of a contract": In exchange for receiving federal funds, States must agree to be bound by the statute's conditions. *Id.* at 296 (quoting *Pennhurst*, 451 U.S. at 17). States cannot "knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Id.* Accordingly, Spending Clause statutes must set out their conditions "'unambiguously,'" placing state officials on "clear notice" regarding "the obligations that go with [federal] funds." *Id.* (quoting *Pennhurst*, 451 U.S. at 17); *see also, e.g., Davis Next Friend LaShonda D.* v. *Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640 (1999).

That clear-notice principle applies with full force to the IDEA. *See Forest Grove*, 557 U.S. at 246; *Winkelman ex rel. Winkelman* v. *Parma City Sch. Dist.*, 550 U.S. 516, 533-534 (2007); *Rowley*, 458 U.S. at 190 n.11, 204 n.26. In *Arlington*, for example, the Court considered the scope of the IDEA's provision authorizing an award of "reasonable attorneys' fees as part of the costs" to prevailing parties. 20 U.S.C. § 1415(i)(3)(B)(i). In deciding whether that provision authorizes recovery of expert fees, the Court explained that the IDEA must be viewed from "the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds." *Arlington*, 548 U.S. at 296. Because the provision does not provide "clear notice" that expert fees are recoverable, *id.* at 298, the Court held that the Act does not impose an obligation on States to compensate prevailing parties for such expenses. *Id.* at 293-294; *see also FAA* v. *Cooper*, 132 S. Ct. 1441, 1448 (2012) (applying the sovereign-immunity canon to the scope of a statutory provision).

In fact, the Court has already applied the clear-notice rule to the very issue in this case: the meaning of a FAPE. *See Rowley*, 458 U.S. at 190 n.11, 204 n.26. As this Court has said, the FAPE requirement is the mandate "most fundamental to the Act." *Winkelman*, 550 U.S. at 530. It is the statute's "core requirement," U.S. Br. 1, governing "the educational programs IDEA directs school districts to provide." *Arlington*, 548 U.S. at 305 (Ginsburg, J., concurring in part and concurring in the judgment). There can be no doubt, then, that States would have considered the obligations imposed by this requirement critical when "deciding whether [to] accept IDEA funds." *Id.* at 296 (majority opinion); *see also id.* at 317

(Breyer, J., dissenting) (calling this "the basic objective of *Pennhurst*'s clear-statement requirement").

Remarkably, neither petitioner nor the Government even mentions the clear-notice rule, or attempts to argue that the statute unambiguously contains the standards they propose. Perhaps that is because petitioner and the Government cannot decide for themselves what the statute means. Between the certiorari stage and the merits stage, petitioner's proposed standard has transformed from "substantial educational benefit," Pet. 24, to "substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society," Pet. Br. 14. The Government's standard, in turn, has shifted from "educational benefits that are meaningful in light of the child's potential and the IDEA's stated purposes," U.S. Cert. Br. 14, to "an opportunity to make significant educational progress, taking account of the child's unique circumstances," U.S. Br. 6-7. These shifting and inconsistent standards say it all. If even petitioner and the Government cannot figure out what the statute requires—or bring themselves to argue that the clear-notice rule is satisfied—then surely no State could be on "clear notice" of the standards they propose.

B. The IDEA Does Not Require States To Provide "Substantially Equal Educational Opportunity" Or "Significant Educational Progress"

1. A review of the statutory text confirms that the IDEA does not contain the other side's standards. Start by reading the statute as *Arlington* instructs: by "view[ing] [it] from the perspective of a state

official * * * deciding whether the State should accept IDEA funds," and "ask[ing] whether [that] official would clearly understand" that the statute establishes the obligations petitioner and the Government propose. 548 U.S. at 296.

Such an official would begin, naturally, by looking at the Act's 25 enumerated "conditions" for receiving federal funds. 20 U.S.C. § 1412(a). The first condition says that a participating State must make a "free appropriate public education available to all children with disabilities residing in the State between the ages of 3 and 21." *Id.* § 1412(a)(1). To understand what that requirement means, the official would turn to the applicable definition. It says that "[t]he term 'free appropriate public education' means special education and related services that" meet four enumerated requirements. *Id.* § 1401(9). So, the official would conclude, her State must provide "special education and related services" to each child with a disability. Nothing about "equal opportunity" or "significant progress" so far.

The conscientious official would then examine the definitions of each of those subsidiary terms. "The term 'special education' means specially designed instruction * * * to meet the unique needs of a child with a disability." *Id.* § 1401(29). "The term 'related services' means * * * such * * * supportive services * * * as may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26). Plainly read, these provisions require States to provide "personalized instruction" to children with disabilities, along with services enabling those children to "benefit" from that instruction. *See Rowley*, 458 U.S. at 189, 197, 201, 203, 207 (adopting this reading). An official would clearly understand,

then, that her State must deliver personalized education that provides children with "some educational benefit." *Id.* at 200. But she would see nothing about the "level of education" those children must receive. *Id.* at 189.

The official would then consider each of the sub-requirements contained in the FAPE definition. A child's special education and related services must be free and publicly supervised. 20 U.S.C. § 1401(9)(A). They must meet state educational standards. *Id.* § 1401(9)(B). They must "include an appropriate preschool, elementary school, or secondary school education in the State involved," *id.* § 1401(9)(C)—that is, they must "approximate the grade levels used in the State's regular education." *Rowley*, 458 U.S. at 189, 203. And they must be "provided in conformity with the [IEP] required under section 1414(d)." 20 U.S.C. § 1401(9)(D). Section 1414(d), in turn, imposes a host of requirements regarding the content of an IEP. *See id.* § 1414(d)(1)(A)(i). But none of these provisions makes any mention of "equal opportunity" or "significant progress."

And that is the end of the FAPE definition. An official winding through each of its terms, sub-definitions, sub-requirements, and cross-references would thus find nothing "even hint[ing] that acceptance of IDEA funds makes a State responsible for" providing substantially equal educational opportunities or significant educational progress to children with disabilities. *Arlington*, 548 U.S. at 297. Such a "substantive standard" is simply "absent from the language of the statute." *Rowley*, 458 U.S. at 189. Under *Arlington* and *Pennhurst*, that is the end of the matter: Those requirements do not exist.

2. Petitioner and the Government nonetheless ask the Court to hold that, for decades, each State has "knowingly accept[ed]" federal funds on the understanding that it must satisfy the sweeping standards they propose. *Arlington*, 548 U.S. at 296. They say the States received notice of those requirements through a single word: "appropriate." Pet. Br. 16; U.S. Br. 16-17. That cannot be.

a. For starters, "appropriate" appears as part of a statutorily defined term: "free appropriate public education." And the Act's definition of that term lacks either of the meanings petitioner and the Government propose. Rather, the Act provides that "[t]he term 'free appropriate public education' means special education and related services that" meet four requirements. 20 U.S.C. § 1401(9). It is black-letter law that "[w]hen *** a definitional section says that a word 'means' something, the clear import is that this is its *only* meaning"—in other words, the statutory definition "is virtually conclusive." Antonin Scalia & Bryan A. Garner, *Reading Law* 226, 228 (2012). Petitioner and the Government cannot substitute their preferred definition of a FAPE for the one the Act provides.

Perhaps recognizing this, petitioner (at 16) and the Government (at 17) suggest that the standards they propose can also be found in subparagraph (C) of the FAPE definition, which says that the special education and related services a State provides must "include an appropriate preschool, elementary school, or secondary school education in the State involved." 20 U.S.C. § 1401(9)(C). But *Rowley* already settled the meaning of this subparagraph, construing it to require that a child's education and services "approximate the grade levels used in the

State's regular education." 458 U.S. at 189; *see id.* at 203 (same). As the Court explained, Congress used the word "appropriate" in this provision to convey that States must place children in a "suitable" educational "setting[]," not as "a term of art which concisely expresses" the sorts of standards petitioner and the Government suggest. *Id.* at 198 n.21. Two Congresses have re-enacted the statute against the backdrop of that construction, and States have for decades accepted federal funds on that understanding. *See supra* pp. 23-24. The Court cannot revisit it now.

b. The other side's problems do not end there. Even if it were *possible* to infer a substantive standard from the word "appropriate," the word surely does not "unambiguously" impose any such standard. "Appropriate" is the very paragon of ambiguity, and in case after case, the Court has said that it lacks the clarity necessary to overcome *Pennhurst* and similar clear-statement rules.

Pennhurst itself said as much. That case concerned a provision of a Spending Clause enactment stating that persons with disabilities have "a right to appropriate treatment, services, and habilitation" in state facilities. 451 U.S. at 13. Much as in this case, the Government argued that the words "appropriate treatment" obligated participating States to provide a certain "adequate" level of services to persons with disabilities. *Id.* at 7-9, 22. The Court disagreed. The clear-statement principle "applies with greatest force," it said, "where, as here, a State's potential obligations under the Act are largely indeterminate." *Id.* at 24. Because "[i]t is difficult to know what is meant by providing 'appropriate treatment,'" the Court continued, "it strains credulity to argue that

participating States should have known of the[] 'obligations'" the Government described. *Id.* at 24-25. This provision thus "fell well short" of providing the "clear notice" the Spending Clause requires. *Id.* at 25.

The Court has reached similar conclusions in applying other clear-statement principles. In *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680 (1983), the Court held that a statute authorizing courts to award "costs of litigation * * * whenever * * * appropriate" did not furnish the "clear showing" necessary to abrogate the American Rule or waive sovereign immunity, because "[i]t is difficult to draw any meaningful guidance from * * * the word 'appropriate.'" *Id.* at 682-685 (emphasis omitted). In *Sossamon* v. *Texas*, 563 U.S. 277 (2011), the Court held that the phrase "appropriate relief against a government" did not "unequivocally" waive States' sovereign immunity, because "'[a]ppropriate relief' is open-ended and ambiguous about what types of relief it includes," and "susceptible of multiple plausible interpretations." *Id.* at 285-288.

What was true in *Pennhurst*, *Ruckelshaus*, and *Sossamon* is also true here: The word "appropriate" cannot overcome the clear-notice rule. The Court therefore cannot, as petitioner and the Government suggest, construct a meaning for "appropriate" by freely consulting "context," U.S. Br. 17, and "other sources," Pet. Br. 19. In *Sossamon*, the only "context" that mattered was that "the defendant [was] a sovereign." 563 U.S. at 286. In *Ruckelshaus*, the "other sources" the Court examined were the rules requiring a clear statement shifting fees or waiving sovereign immunity. 463 U.S. at 683-686. Here, the

"context" is that the IDEA is a contract with the States; the Court should look no further.

Forest Grove and *West* v. *Gibson*, 527 U.S. 212 (1999), only reinforce the point. In *Forest Grove*, the Court held that the IDEA provision authorizing "such relief as [a] court determines is appropriate" permits reimbursement of the costs of private-school tuition. 557 U.S. at 232-233, 237-238, 246 (quoting 20 U.S.C. § 1415(i)(2)(C)(iii)). The Court said States were "on notice" of that requirement for two reasons: first, because reimbursement awards merely require States to "'belatedly pay expenses'" that they "expressly agree[d]" to pay when they signed up for the Act; and second, because the Court had previously issued the same interpretation and Congress had ratified it. *Id.* at 246 (quoting *Sch. Comm. of Burlington* v. *Dep't of Educ.*, 471 U.S. 359, 370-371 (1985)).[2] *West* similarly concluded that the term "appropriate remedies" in Title VII unambiguously authorizes damages awards against the Federal Government because a separate provision "*explicitly* allow[s] damages in actions under Title VII." *Sossamon*, 563 U.S. at 286 (emphasis added) (describing *West*, 527 U.S. at 217-218, 222); *see also West*, 527 U.S. at 224 (Kennedy, J., dissenting) (contending that even this evidence was insufficiently clear). None of these considerations is present here: The other side identifies no "express" or "explicit" lan-

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[2] The Court's prior decision, *Burlington*, did not discuss the Spending Clause clear-statement rule, likely because no party mentioned it. *See, e.g.*, Pet. Br., *Burlington*, *supra*, 1985 WL 669932. The Court has since made clear that "*Pennhurst*'s notice requirement" applies to the Act's remedial provisions. *Forest Grove*, 557 U.S. at 246; *see Arlington*, 548 U.S. at 296.

guage imposing the requirements they advocate, and the history of congressional ratification cuts decisively against them. *See supra* pp. 23-24.

c. Nor is that the last of the other side's problems. Even if one thought that "appropriate" was not limited to the statutory definition of a FAPE, and also that it unambiguously imposed some type of substantive standard on States, petitioner and the Government could *still* not prevail unless the statute unambiguously imposed *their* particular standard(s). There is no way that can be the case.

To begin, petitioner and the Government *themselves* cannot agree what standard the word "appropriate" supposedly conveys. According to petitioner, an "appropriate education" is one that provides "substantially equal opportunit[y]," Pet. Br. 40-41—except a few months back, it meant an education that provides a "substantial educational benefit," Pet. 24. According to the Government, it is one that enables "significant progress," U.S. Br. 17—though in August, it meant one that was "meaningful in light of the child's potential," U.S. Cert. Br. 14. Three *amici* States disagree, saying that *they* are "on notice" that the word "appropriate" simply requires a "meaningful educational benefit." Del., Mass. & N.M. *Amicus* Br. 3-4; *see* Pet. 10-11 (describing circuits that also adopt a "meaningful benefit requirement"). And, of course, all of these readings differ from this Court's interpretation in *Rowley* that "an 'appropriate education' is provided when personalized educational services are provided," 458 U.S. at 197—although three Justices in dissent were sure "appropriate" actually meant "*full* educational opportunity," *id.* at 213 (White, J., dissenting, joined by Brennan and Marshall, JJ.). Five proponents, seven

opinions: This does not sound like a word that is "unambiguous."

All of this confusion stems, perhaps, from the fact that petitioner and the Government are more or less making up their standards from whole cloth. Petitioner tries to link his proposed standard to one of the Act's *findings*, which says that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity * * * for individuals with disabilities." 20 U.S.C. § 1400(c)(1). But as this Court held in *Pennhurst*, a statute's "general statement of 'findings'" is "too thin a reed" to be a source of "rights and obligations." 451 U.S. at 19. And in any event, this particular finding is several steps removed from the standard petitioner proposes: It says that "improving educational results" is an "*element*" of a "*policy*" of "ensuring equality of opportunity." 20 U.S.C. § 1400(c)(1) (emphases added). A State would hardly be on "clear notice" that this phrase imposes a legally enforceable obligation to provide substantially equal educational opportunity.

The Government's brief is even more brazen. It does not pretend that its "significant educational progress" standard appears in the Act. Rather, it seems to have derived that standard by taking the words "meaningful" "access" from *Rowley* and swapping in very rough synonyms. U.S. Br. 14-15 & n.4. In addition to being entirely unmoored from the text of the *statute*, this approach is irreconcilable with *Rowley*, *see supra* pp. 21-22, and this Court's subsequent explanation that "meaningful access" does not require any particular "level of education." *Cedar Rapids*, 526 U.S. at 79; *see also id.* at 73 ("As a general matter, services that enable a disabled child

to remain in school during the day provide the student with 'the meaningful access to education that Congress envisioned.' "). It is also telling that, by all appearances, the agency "responsible for the administration of the Act" has never before adopted this reading, or attempted to cut off IDEA funds on the ground that a State failed to comply with it. *Pennhurst*, 451 U.S. at 23-25.

Petitioner (at 41-43) and the Government (at 18-24) argue that their standards draw support from the Act's structure and purposes. As discussed below, they do not. *See infra* pp. 38-51. In any event, absent an unambiguous text, the Act's broader structure and purpose cannot provide the clear notice *Pennhurst* requires. *See Rowley*, 458 U.S. at 190 n.11 (stating that searching for the meaning of "an 'appropriate education' * * * 'in the purpose of the statute' " is "contrary to the fundamental proposition that Congress" must impose spending conditions "unambiguously"). Indeed, the Court has repeatedly disapproved of reading statutes—and particularly Spending Clause statutes—to impose substantive obligations that take their content mainly from the enactment's broad purposes. *See Barnes* v. *Gorman*, 536 U.S. 181, 187 (2002) ("[A] recipient [of federal funds] may be held liable * * * for intentional conduct that violates the clear terms of the relevant statute, but not for its failure to comply with vague language describing the objectives of the statute." (citation omitted)); *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001) (stating that courts may not read a statute to establish remedies because they are ostensibly "necessary to make effective the congressional purpose" (internal quotation marks omitted)).

In sum, the Act provides no clue of the "substantially equal educational opportunity" or "significant educational progress" standards petitioner and the Government propose. And the triple bank-shot they need to prevail—ignore the statutory definitions, assert that "appropriate" is unambiguous, and assign it a meaning that lacks any textual mooring—confirms that no reasonable state official would be on "clear notice" of the obligations they ask this Court to impose.

C. The "Some Educational Benefit" Standard Flows From The IDEA's Text, Structure, And Purpose

The "some educational benefit" standard, by contrast, has a firm textual footing and coheres with the statute's structure and purpose. Petitioner and the Government object that this standard cannot achieve all of the statute's aims on its own, but that argument ignores the rest of the Act's comprehensive scheme, which helps ensure that children with disabilities will receive a high-quality education.

1. The textual source of the "some educational benefit" standard is clear. The Act says that a FAPE consists of "special education and related services," 20 U.S.C. § 1401(9), which it defines as "specially designed instruction * * * to meet the unique needs of a child with a disability" along with such "supportive services * * * as may be required to assist a child * * * *to benefit* from" that instruction, *id.* § 1401(26), (29) (emphasis added). Any state official reading this language would understand that it requires States to provide personalized instruction and services designed to enable children "to benefit from" that instruction. *Id.* § 1401(26); *see Rowley*, 458 U.S. at

189, 200-201, 203, 206-207. "Noticeably absent from th[is] language *** is any substantive standard prescribing the *level* of education to be accorded handicapped children." *Rowley*, 458 U.S. at 189 (emphasis added). All that it requires—putting aside for the moment the Act's many other obligations—is that an IEP be reasonably calculated to confer "some educational benefit." *Id.* at 200-201.

The statute also makes clear that that "benefit" cannot be trivial. "[A]ll enactments" are adopted against the background legal principle "*de minimis non curat lex* ('the law cares not for trifles')." *Wis. Dep't of Revenue* v. *William Wrigley, Jr., Co.*, 505 U.S. 214, 231-232 (1992). Any reasonable official reading the Act would therefore recognize that she must aim to provide a benefit that is "more than *de minimis*." Pet. App. 16a.

2. The "some educational benefit" standard is also consistent with the Act's structure and purpose. The IDEA is a comprehensive and extraordinarily detailed regulatory statute. To advance its broad purpose of "ensur[ing] that all children with disabilities have available to them a free appropriate public education," 20 U.S.C. § 1400(d)(1)(A), the Act sets 25 conditions on federal funding that span 59 pages and fill thousands of words of the U.S. Code. These provisions establish two principal mechanisms for ensuring that children with disabilities receive a high-quality education: (a) exacting *procedures* that IEP Teams must follow in developing an individual child's IEP and (b) *systemic requirements* that educational agencies must implement on a state-wide basis. These are the means Congress chose to achieve its ambitious goals. It is unnecessary, and improper, to infer an atextual substantive standard

above "some educational benefit" to try to advance them in a different way.

a. The Act's principal means of achieving its goals is its finely reticulated set of procedures for crafting an IEP. As *Rowley* explained, it was Congress's "conviction" that "adequate compliance with the[se] procedures * * * would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." 458 U.S. at 206.

To see why, just walk through the elaborate process that every school must follow when designing a child's IEP. At the start, the school must conduct a holistic evaluation of the child to determine the nature of his disability and his resulting needs. *See* 20 U.S.C. § 1414(a)-(c). With that evaluation in hand, the school must assemble an IEP Team composed of the child's parents, his teachers, and educational experts. *Id.* § 1414(d)(1)(B). Together, the team examines all relevant factors, including the results of the evaluation, the "strengths" and "needs" of the child, the "concerns of the parents," and, "in the case of a child whose behavior impedes the child's learning," "strategies" to "address that behavior." *Id.* § 1414(d)(3)(A)-(B).

Based on this analysis, the team writes the child's IEP. It must ensure the IEP satisfies a checklist of requirements. Most importantly, the IEP must address the child's present levels of performance, set forth his annual goals, and describe the specific services to be provided to him. *Id.* § 1414(d)(1)(A)(i). The IEP Team must also try, "[t]o the maximum extent appropriate," to ensure that the child is "educated with children who are not disabled." *Id.* § 1412(a)(5)(A).

And, following Congress's amendments in 1997 and 2004, the IEP Team must do still more. Those amendments made even more elaborate the process for developing an IEP. *See* IDEA Amendments of 1997, Pub. L. No. 105-17, sec. 101, § 614(d)(1)(A), 111 Stat. 37, 83-85; Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, sec. 101, § 614(d)(1)(A), 118 Stat. 2647, 2707-2709. Today, the IEP Team must think about the child both "academic[ally]" and "functional[ly]" in assessing his "present levels" of performance. 20 U.S.C. § 1414(d)(1)(A)(i)(I). It must focus on the "general education curriculum" and "each" of the child's "educational needs" in setting his annual goals. *Id.* § 1414(d)(1)(A)(i)(II). And it must keep in mind those goals, as well as that curriculum, in developing the child's special education and related services based on "peer-reviewed research to the extent practicable." *Id.* § 1414(d)(1)(A)(i)(IV). Once a child turns 16, the IEP Team must also devise "appropriate measurable postsecondary goals" and "transition services * * * needed to assist the child in reaching" them. *Id.* § 1414(d)(1)(A)(i)(VIII).

In construing these provisions, the Department of Education has imposed requirements even more specific. It has interpreted the words "general education curriculum" to mean that a child's annual goals "must be aligned with the State's academic content standards for the grade in which the child is enrolled." U.S. Dep't of Educ., Dear Colleague Letter 1 (Nov. 16, 2015);[3] *see* 34 C.F.R. § 300.320(a)(1)(i).

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[3] *Available at* https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf.

Accordingly, state academic content standards "must guide" the IEP Team's "individualized decision-making" during the IEP process. Dear Colleague Letter, *supra*, at 4.

All together, then, the IEP process includes a wide array of elements to "assure" that an IEP contains "much if not all of what Congress wished in the way of substantive content." *Rowley*, 458 U.S. at 206. The process compels informed deliberation—ensuring that each IEP is developed only after thorough evaluation of the child, consideration of all relevant factors, and consultation with experts and interested stakeholders. The process "maximize[s] parental involvement," ensuring that a child's most devoted advocates are in the room when the IEP is crafted. *Id.* at 182 n.6. And through a checklist of requirements that both Congress and the Department have made longer and more detailed over the years, the process focuses the IEP Team on the considerations necessary to write an IEP that is personalized, holistic, and ambitious. Each element of this process is enforceable in court, 20 U.S.C. § 1415(f)(3)(E)(ii), and if a school materially violates the terms of the IEP that the process produces, parents may sue for specific performance or other remedies, *see Seth B. ex rel. Donald B.* v. *Orleans Parish Sch. Bd.*, 810 F.3d 961, 977-978 & n.67 (5th Cir. 2016).

These procedures do not, of course, demand any particular substantive outcome. But many statutes rely on a robust procedural framework to ensure good substantive results. The National Environmental Policy Act (NEPA), for example, requires agencies to closely evaluate significant regulatory actions, "consult" with interested stakeholders, and write a

"detailed statement" describing the expected environmental consequences of their decisions. 42 U.S.C. § 4332(C). Like the IEP process, this "hard look" process "does not mandate particular results." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). But as the Court has explained, it is "almost certain to affect [an] agency's substantive decision," and it is the sole means Congress prescribed to ensure that NEPA's "sweeping policy goals * * * are * * * realized." *Id.* Other statutes rely similarly on a rigorous process to achieve sound results. *See* 18 U.S.C. § 3553(a) (describing the factors a district court must consider in imposing a criminal sentence); *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 374-375 (1998) ("The Administrative Procedure Act * * * establishes a scheme of 'reasoned decisionmaking.' * * * Reasoned decisionmaking * * * promotes sound results * * * ."); *Little Bay Lobster Co.* v. *Evans*, 352 F.3d 462, 470 (1st Cir. 2003) ("[T]he [Regulatory Flexibility] Act creates procedural obligations to assure that the special concerns of small entities are given attention in the comment and analysis process * * * .").

The IDEA is no different. The IDEA sets up a process of reasoned decisionmaking, involving the right people with the right information and the right focus. And when a team of parents, teachers, and experts carries out that process in full—as every team must—it is highly likely to result in an IEP that "meet[s] [a child's] unique needs and prepare[s] [him] for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); *see also Forest Grove*, 557 U.S. at 247 ("[C]ourts should generally presume that public-school officials are properly performing their obligations under IDEA."). Even

the Government acknowledges as much; "[i]n most cases," it says (at 28), "schools and parents will reach consensus on an IEP that is reasonably calculated to help the child learn and succeed."

b. The Act reinforces those procedures with ambitious systemic requirements. One condition for receiving federal funds requires each State to set a "detailed timetable" for "providing full educational opportunity to all children with disabilities." 20 U.S.C. § 1412(a)(2). Another condition requires States to align their "goals for the performance of children with disabilities" with their goals for other children under the ESEA. *Id.* § 1412(a)(15)(A)(ii), (B). The Act also requires States to adopt a variety of policies concerning teacher qualifications, instructional materials, and other matters. *See id.* § 1412(a)(14), (23).

In 2004, Congress amended the Act to give these requirements teeth. Expressing serious "concern[] about the effectiveness of monitoring and enforcement" under the preexisting statute, it gave the Department of Education broad authority to ensure States' compliance with these conditions. H.R. Rep. No. 108-77, at 120 (2003); *see* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, sec. 101, § 616, 118 Stat. 2647, 2731-2737. The statute now provides that each State must submit a performance plan to the Department establishing "measurable and rigorous targets" for achieving the Act's goals, as well as annual performance reports tracking the State's progress. 20 U.S.C. § 1416(b)(2)(A), (C)(ii). The Department may disapprove a State's performance plan. *Id.* § 1416(c). And if the Department determines that a State is not "meet[ing] the [Act's] requirements and purposes,"

id. § 1416(d)(2)(A), it may implement an escalating series of enforcement measures, from imposing conditions on the State's use of federal funds to cutting off the State's IDEA funding in whole or in part, *id.* § 1416(e)(1)(B)-(C), (2)(B)(iii)-(v), (3)(B).

The Department has made ample use of this authority. In the last three years alone, it has found that Delaware, Texas, Nevada, and the District of Columbia were failing to meet the Act's requirements.[4] Because D.C. was deemed in noncompliance for several years, the Department directed it to reallocate a substantial portion of its federal funding to problem areas, submit a corrective action plan, and regularly report on its remedial efforts. *See* Letter from U.S. Dep't of Educ. to D.C. Superintendent of Educ. 8-9 (June 28, 2016). Other States promptly fixed their errors after the Department's notice—bearing out this Court's prediction, in a related context, that where the Secretary holds the authority to cut off federal funds, it is "doubt[ful] that the Secretary's notice to a State that its [implementation] scheme is inadequate will be ignored." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1387 (2015).

In short, the "some educational benefit" standard must be viewed within the context of the entire Act, including its procedural and systemic requirements.

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[4] *See* Letter from U.S. Dep't of Educ. to D.C. Superintendent of Educ. (June 28, 2016); Letter from U.S. Dep't of Educ. to Nev. Dep't of Educ. (June 28, 2016); Letter from U.S. Dep't of Educ. to Tex. Educ. Agency (June 30, 2015); Letter from U.S. Dep't of Educ. to Del. Dep't of Educ. (June 23, 2014). These letters may be found at http://www2.ed.gov/fund/data/report/idea/partbspap/allyears.html.

Those elaborate and highly specific provisions refute the notion that Congress thought a greater substantive standard necessary to achieve its aims. Indeed, the structure of the Act suggests the opposite: that Congress did *not* intend to impose a greater substantive requirement. The evident care that Congress took in crafting and revising such a "comprehensive and reticulated statute" weighs heavily against adding requirements that Congress failed to "incorporate expressly." *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146 (1985) (internal quotation marks omitted); *see also Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2530 (2013) (similar). It would be strange indeed if Congress designed this comprehensive scheme only to leave implicit a substantive standard as significant as the standards proposed by petitioner and the Government. *See Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress * * * does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.").

3. Petitioner and the Government draw a different conclusion from this comprehensive statutory scheme. They argue that the thousands of words Congress wrote in the statute will amount to nothing unless this Court writes in a few more. But each of their arguments springs from the same fundamentally erroneous premise: that "some educational benefit" is the Act's *only* means of achieving its ends.

a. Petitioner and the Government contend that a child cannot receive a FAPE if "at the end of the day" schools have to provide children "only" a "barely more than trivial" educational benefit. Pet. Br. 23; *see* U.S. Br. 36. That assumes, though, that the Act's substantive requirement is its *only* requirement—

which it is not. As just explained, Congress also established "elaborate and robust" procedures for developing an IEP. U.S. Br. 19. And no one who actually goes through that extensive and rigorous process comes away thinking "it is perfectly fine to aim low." *Id.* at 36. Rather, the Act's procedural provisions require that an IEP be developed in a thoughtful and reasoned way—justifying Congress's "conviction" that "the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley*, 458 U.S. at 206.

Those provisions make clear, moreover, that the Government's parade of horribles is entirely illusory. The Government suggests that the "some educational benefit" standard would permit schools to satisfy the FAPE requirement even while providing a child specialized services (1) for only part of the school year, (2) to address only some of the needs arising from her disability, or (3) to help a child in only some of her classes. U.S. Br. 30-31; *see* Pet. Br. 17.

No. The procedural provisions of the statute plainly prohibit all of these things. A school cannot offer services for only part of the school year both because the obligation to provide services that enable a child "to benefit from special education" is continuous, and because terminating a child's services would require a determination that the child was no longer "disabled"—something that can normally be done only through the IEP process. *See Cedar Rapids*, 526 U.S. at 76-79 (concluding that the "related services" definition prohibits a school from providing "[i]ntermittent" services that do not permit a child "to remain in school" continuously); *see* 20 U.S.C. § 1414(b)(4), (c)(5)(A). A school cannot provide ser-

vices that address some but not all of a child's needs because the Act requires that an IEP be designed with the goal of addressing "*each* of the child's * * * educational needs that result from the child's disability." 20 U.S.C. § 1414(d)(1)(A)(i)(II)(bb) (emphasis added); *see also id.* §§ 1401(29), 1414(d)(1)(A)(i)(IV). A school cannot provide a child specialized services in some but not all of her classes because an IEP must have the goal of advancing a child in the "general education curriculum," and, to the extent possible, enable her to be "educated" in the school's "regular classes." *Id.* §§ 1414(d)(1)(A)(i)(II)(aa), 1412(a)(5)(A). Tellingly, the Government cannot identify a single court in three decades that has upheld any of these unlawful practices, even though the "some educational benefit" rule has prevailed in most of the country. That these imagined problems have never actually arisen shows there is no need to adopt the radical new rules petitioner and the Government propose.[5]

b. Petitioner (at 19-21, 35-40) and the Government (at 32-33) also contend that the "some educational benefit" standard is in tension with Congress's findings and purposes. They rely, in particular, on certain findings made by Congress in amending the Act after *Rowley*—among them, that "[i]mproving educational results for children with disabilities is an

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[5] Nor is it clear why the Government's standard would address the problems it imagines. By the Government's logic, a school could satisfy the FAPE standard by enabling a child to make "significant progress" in just the first two months (but not the remainder) of the school year, in just her reading skills (but not her communication skills), or in just her social studies class (but not her math and science classes). *See* U.S. Br. 30-31.

essential element of our national policy of ensuring equality of opportunity," that "the implementation of this [Act] has been impeded by low expectations," and that "the education of children with disabilities can be made more effective by * * * having high expectations for such children." 20 U.S.C. § 1400(c)(1), (c)(4), (c)(5).

These findings leave no doubt that Congress wanted to improve educational results and replace low expectations with high ones. But what is important is *how* Congress sought to achieve those goals. In amending the Act in 1997 and 2004, Congress did not alter the definition of a FAPE; indeed, in hundreds of pages of committee reports, the amendments' drafters did not once hint that they intended to revise the *Rowley* standard. Rather, Congress amended the Act by deepening the IEP-development process and strengthening the Act's systemic requirements. The 1997 Amendments, for example, required IEP Teams to place more "emphasis on [a child's] participation in the general education curriculum," S. Rep. No. 105-17, at 20 (1997), and States to include children with disabilities in state and district-wide assessment programs, *id.* at 21. The 2004 amendments required IEP Teams to "focus" on "measuring" a child's "academic achievement," H.R. Rep. No. 108-77, *supra*, at 108, and States to "align their accountability systems" with the No Child Left Behind Act, *id.* at 83. These were the means Congress chose to strengthen the Act. And if anything, the fact that the Act's procedures and systemic requirements have gotten *stronger* over the years only makes a searching substantive standard *less* necessary, not more so.

c. Finally, petitioner and the Government contend that the "some educational benefit" standard is "irreconcilable" with various IDEA provisions. Pet. Br. 21; *see* U.S. Br. 18-19. The Government, for instance, points (at 19) to the Act's procedures, arguing that Congress would not have made them so "elaborate and robust unless it intended to guarantee eligible children an opportunity to make significant educational progress." But the "legislative conviction" behind the Act was that a substantive guarantee of that kind would be unnecessary *precisely because* the procedures were so elaborate and robust. *Rowley*, 458 U.S. at 206. Petitioner and the Government might prefer a different statute, with a greater substantive component. But this Court does not superimpose substantive standards on top of "essentially procedural" requirements on the theory that the statute would work better that way. *Vt. Yankee Nuclear Power Corp.* v. *NRDC, Inc.*, 435 U.S. 519, 557-558 (1978).[6]

Petitioner (at 25) and the Government (at 20) also point to a State's obligation under the Act to "establish[] a goal of providing full educational opportunity to all children with disabilities." 20 U.S.C. § 1412(a)(2). But that systemic requirement existed at the time of *Rowley*, and the Court still rejected any substantive standard based on equality of opportunity. 458 U.S. at 180, 198-200. For good reason.

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[6] The Department of Education's regulations and interpretive guidance add nothing to the Government's argument. As explained above on pp. 40-41, the Department's Dear Colleague Letter merely fleshes out one of the requirements of the IEP process—namely, that an IEP Team must use the general education curriculum as a guide.

That provision in the Act concerns a state-wide "goal," not a substantive individual entitlement. What's more, the Act gives States leeway to accomplish the goal on their own "timetable." 20 U.S.C. § 1412(a)(2). It would surely "surpris[e]" the States if this provision were read to impose either petitioner's or the Government's substantive mandate. *Pennhurst*, 451 U.S. at 25.

Petitioner's (at 25-27) and the Government's (at 22-23) reliance on the ESEA is similarly misplaced. As amended by the No Child Left Behind Act of 2001, the ESEA establishes a system for holding schools accountable via student testing and performance. 20 U.S.C. § 6311. In 2004, Congress amended the IDEA to make children with disabilities part of this accountability system. *Id.* § 1412(a)(15)(A)(ii), (a)(16)(A). States must now set standards for, and assess, children with disabilities under the ESEA. But that, too, is a state-wide requirement, not a substantive individual entitlement. Moreover, the statute makes plain that the purpose of the assessments is to enable States to "assess progress" toward achieving ESEA goals, *id.* § 1412(a)(15)(B), and "measure the academic achievement of such children relative to" ESEA standards, *id.* § 6311(b)(2)(B)(vii)(II); *see* S. Rep. No. 108-185, at 17-18 (2003). Nothing in the Act suggests Congress intended to establish a sweeping, individual right to some level of achievement on those tests. The fact that Congress chose to strengthen a systemic requirement rather than alter the definition of a FAPE shows, once again, that Congress did not intend to adopt the standards petitioner and the Government propose.

* * *

To sum up: As *Rowley* rightly concluded, the IDEA's text straightforwardly imposes a "some educational benefit" requirement. But that is not the only requirement the Act contains. Its comprehensive and reticulated provisions help ensure that children will and do receive a high-quality education. There is no basis or need to second-guess Congress's design.

III. PETITIONER'S AND THE GOVERNMENT'S PROPOSED STANDARDS ARE UNWORKABLE

This Court should reject the standards proposed by petitioner and the Government for another reason: They are just as "unworkable" today as they were when this Court decided *Rowley*. 458 U.S. at 198. By contrast, more than three decades' experience has shown the "some educational benefit" standard to be readily administrable, and thus worthy of this Court's continued adherence.

1. a. For a standard to be workable in practice, it must "not [be] so 'vague and amorphous' that its enforcement would strain judicial competence." *Blessing* v. *Freestone*, 520 U.S. 329, 340-341 (1997). It must not thrust courts into areas of policy in which they lack "specialized knowledge and experience." *Rowley*, 458 U.S. at 208 (internal quotation marks omitted). And it must not "impose upon parties a confusing and onerous legal regime." *Winkelman*, 550 U.S. at 532. In each of these respects, petitioner's and the Government's proposed standards are a problem.

First, both standards lie beyond the competence of judges to administer. Would an IEP provide a level of educational opportunity "substantially equal" to

that provided other children? A "myriad of factors * * * might affect [a child's] ability to assimilate information presented in the classroom." *Rowley*, 458 U.S. at 198. Under petitioner's standard, a court would have to isolate the influence of each factor, and measure the educational opportunity provided by the IEP alone. The court would then have to do the same for "children *without* disabilities," Pet. Br. 30 (emphasis added), measuring what part of *their* progress is due to the opportunities provided by the school, as opposed to other factors. And even if a court could do all that, it would still have to compare the opportunity afforded by the IEP with the opportunities afforded other children, to determine whether they were "substantially equal." As *Rowley* recognized in rejecting such a standard, these are "impossible measurements and comparisons." 458 U.S. at 198.

The measurements required under the Government's test are tremendously difficult, too. How is a court to decide whether the progress promised by an IEP is "significant"? Sometimes, the Government says, "significant" means "master[ing] grade-level content"; other times, though, it does not. U.S. Br. 10. All the Government can say for sure is that schools should "enable eligible children to make progress that is *appropriate* in light of their own particular needs and capabilities." *Id.* (emphasis added). But telling courts that an "appropriate" education means a "significant" one, which in turn means an "appropriate" one, hardly helps them draw a principled line.

Second, both petitioner's and the Government's standards would embroil courts in educational policy disputes best resolved by others. As this Court has

said, education is an area of "intractable economic, social, and even philosophical problems" in which the Court lacks "specialized knowledge and experience." *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 42 (1973) (internal quotation marks omitted); *see also Rowley*, 458 U.S. at 208. Yet, both petitioner and the Government would require courts to evaluate the *level of education* an IEP is designed to provide—either to assess whether it would be substantially equivalent to that afforded other children, or to assess whether it would reflect significant progress for that particular child. And a court cannot evaluate the level of education an IEP would provide without judging the *quality* of the educational methods and services promised: How good are the child's teachers? How effective are their teaching methods—and would a novel method proposed by the parents be better? What difference would smaller class sizes make? Would limited dollars be better spent elsewhere? These "persistent and difficult questions of educational policy" are precisely the questions *Rowley* warned courts should avoid. 458 U.S. at 208 (internal quotation marks omitted); *see also id.* at 207 n.29.

Third, both petitioner's and the Government's standards would generate profound uncertainty about what a child is owed under the statute. Petitioner says that an IEP should provide educational opportunity substantially equal to that provided children without disabilities, but *which* children without disabilities? Those in the same school? The same district? The same State? Petitioner sought certiorari on the ground that "the educational benefit" to which a child is "entitled" should not "depend on the state in which he or she lives." Pet. 15. But

depending on the applicable baseline, a child's entitlement could vary not just from State to State, but from district to district, or even from school to school. Children who might be entitled to certain services in one school (or district or State) might not be entitled to them in another, given disparities in educational opportunities across schools (and districts and States).[7] That would leave parents with little way of knowing the extent of their child's rights, making it difficult "to calculate the risk of unilateral action if they believe their child is not benefitting from his or her education." Pet. 16. And school districts would face a very difficult task in allocating their limited resources by trying to predict what hearing officers and courts would do in the face of such an ambiguous standard.

Given the difficulty of predicting what level of progress a decision-maker might regard as "significant," children, parents, and schools would face uncertainty under the Government's standard, too. Either standard would make figuring out what a child deserves "confusing and onerous." *Winkelman*, 550 U.S. at 532. And the result may well be more—and more complex—disputes between parents and schools, shifting limited resources away from educational services and toward litigation.

b. This case illustrates the problems with the other side's approaches. Indeed, it is telling that neither

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[7] If the baseline were instead an average of the opportunities provided children without disabilities *nationwide*, petitioner's standard would create the following anomaly: Children with disabilities would be entitled to *greater* opportunities than children without disabilities in some schools, and *lesser* opportunities in others.

petitioner nor the Government makes any effort to apply their proposed standards to the record here. The true test of workability, though, is whether their standards can provide a clear answer to the following question: What *should* petitioner's fifth-grade IEP have said?

Throughout this litigation, petitioner has complained about the "lack of progress" he made in the Douglas County public schools. Pet. App. 15a. But changing the goals and objectives in his IEP would not have helped him to progress. If, for example, petitioner was having difficulty learning how to "count money up to $5.00," Supp. J.A. 134sa, setting a new objective of counting money up to $100.00 would accomplish nothing. If petitioner's complaint is that he was not making progress, then the issue lies not with the written objectives, but with what his IEP would have done to help him achieve those objectives.

What help, then, did petitioner's fifth-grade IEP propose? It specified that each week, petitioner would receive 35 hours of "instruction from a special education teacher and support from a paraeducator," one hour of "speech/language intervention," a half hour of "mental health support," and a half hour of "occupational therapy"—for a total of 37 hours of special-education services. *Id.* at 142sa. The IEP also stated that petitioner would spend more than 60 percent of his time in a "[s]ignificant support needs classroom" instead of a general classroom. *Id.* at 142sa-143sa.

Under petitioner's test, a court would have to decide whether those services would be enough to provide petitioner an educational opportunity sub-

stantially equal to that provided children without disabilities. At the very outset, though, that task is made impossible by the fact that the record is completely silent on the level of educational opportunity provided other children, anywhere. A court would thus lack the necessary baseline against which to compare the educational opportunity provided in the IEP.

Even if there were a discernible baseline, a court would face another problem still: articulating why the IEP did (or did not) measure up. Should the school be faulted for not embracing a particular educational method—like "applied behavior analysis"? Pet. Br. 10. For not hiring teachers who "specialize[] in the education of children with autism"? J.A. 9. For maintaining a "student to teacher ratio" of greater than "1:1"? Pet. App. 70a. For maintaining class sizes of more than "eight" students? *Id.* Or for allowing petitioner to "engage with non-disabled children" for too much of the day? *Id.* These are "persistent and difficult questions of educational policy," which divide conscientious parents and experts. *Rowley*, 458 U.S. at 208 (internal quotation marks omitted). And yet, under petitioner's test, a court with no expertise would have to answer them—explaining which things are necessary, and which are not, for petitioner to be afforded an educational opportunity substantially equal to that of other children.

A court would face similar questions under the Government's test. If petitioner's IEP was deficient, what should it have included to provide petitioner an opportunity for significant progress? Additional hours with a special-education instructor? Less time in the general classroom? A commitment to apply

"applied behavior analysis"? As above, these are policy questions better resolved by "state and local educational agencies in cooperation with the parents or guardian of the child." *Id.* at 207. But under the Government's test, a court lacking any specialized knowledge would have to resolve them.

c. Against all this, petitioner contends that "[t]he 'substantially equal opportunity' test simply describes the level of education *schools* must strive to deliver." Pet. Br. 49 (emphasis added). But petitioner's test purports to describe the content of a substantive right that is ultimately enforceable in court. *See* 20 U.S.C. § 1415(f)(3)(E), (i)(2). And under the Act, courts must make "independent decision[s] based on a preponderance of the evidence." *Rowley*, 458 U.S. at 205 (quoting S. Rep. No. 94-455, at 50 (1975) (Conf. Rep.)); *see* 20 U.S.C. § 1415(i)(2)(C). To be sure, administrative findings are entitled to "due weight." *Rowley*, 458 U.S. at 206. But under that "modified de novo standard of review," Pet. App. 6a, courts would still have to "determine independently how much weight" is due. *Ashland Sch. Dist.* v. *Parents of Student E.H.*, 587 F.3d 1175, 1182 (9th Cir. 2009). And a court could not evaluate the "persuasiveness of an administrative finding" under petitioner's test, *M.H.* v. *N.Y. City Dep't of Educ.*, 685 F.3d 217, 244 (2d Cir. 2012), without grappling with difficult questions of educational policy. Petitioner's suggestion (at 49) that, instead of a modified de novo standard, courts may apply "whatever other standard is most fitting" is just another bid to overrule *Rowley*.

Petitioner also contends (at 43-44) that his proposed rule is "eminently workable" because "with the right help," children with disabilities *can* succeed

academically. The question, though, is whether courts are capable of determining what the right help is, without engaging in "impossible measurements and comparisons," *Rowley*, 458 U.S. at 198, involving matters of "educational policy," *id.* at 206. What makes petitioner's standard "entirely unworkable" is the capacity of *courts*—not that of *children*. *Id.* at 198.

For its part, the Government contends (at 25-26) that its standard is "flexible and individualized," resulting in "different IEPs for different children with different capabilities." Of course, the fact that the Government's standard *is* individualized does not make it any easier for courts to administer. And the Government gives no reason to believe that, in applying its standard, courts will be capable of determining which children are entitled to which IEPs.

2. The only workable standard is the one that has been on the books for decades: An IEP must be reasonably calculated to confer "some educational benefit" upon a child with a disability. *Rowley*, 458 U.S. at 200.

This standard is readily administrable. An IEP must include "a statement of the special education and related services" that the school will provide. 20 U.S.C. § 1414(d)(1)(A)(i)(IV). And schools must provide "periodic reports on the progress the child is making." *Id.* § 1414(d)(1)(A)(i)(III). When, as is often the case, a proposed IEP is modeled on a prior one, a court can look at the reports developed under the prior IEP to determine whether the child made progress. If the child made progress, and if the proposed IEP promises similar services, the court

may well conclude that the proposed IEP is reasonably calculated to confer some educational benefit. *See* Pet. App. 21a, 40a-41a.

Of course, there will be borderline cases, just as there are under any standard. Courts must discern the difference between *some* benefit and a benefit that is merely *de minimis*. And they must tailor their analysis to the individualized circumstances of each case, recognizing that what may be remarkable progress for one student may be only *de minimis* for another. *See Rowley*, 458 U.S. at 202. But those are commonsense judgments that judges can make—and have made for decades—without delving into tough questions of educational policy. The Court should not impose a different standard now.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

W. STUART STULLER
CAPLAN AND EARNEST LLC
1800 Broadway, Suite 200
Boulder, CO 80302

DANIEL D. DOMENICO
KITTREDGE LLC
3145 Tejon St., #D
Denver, CO 80211

WILLIAM E. TRACHMAN
DOUGLAS COUNTY
SCHOOL DISTRICT RE-1
620 Wilcox St.
Castle Rock, CO 80104

Counsel for Respondent

NEAL KUMAR KATYAL
Counsel of Record
FREDERICK LIU
EUGENE A. SOKOLOFF
MITCHELL P. REICH*
HOGAN LOVELLS US LLP
555 Thirteenth St., NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

*Admitted only in New York; supervised by members of the firm

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Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

Jeffrey L. Fisher
David T. Goldberg
Pamela S. Karlan
SUPREME COURT
LITIGATION CLINIC
William S. Koski
YOUTH AND EDUCATION
LAW PROJECT
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, CA 94305

Jack D. Robinson
Counsel of Record
SPIES, POWERS &
ROBINSON, P.C.
950 South Cherry Street
Suite 700
Denver, CO 80246
(303) 830-7090
robinson@sprlaw.net

Brian Wolfman
Wyatt G. Sassman
GEORGETOWN LAW
APPELLATE COURTS
IMMERSION CLINIC
600 New Jersey Ave., NW
Washington, DC 20001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF FOR PETITIONER

The decision in *Board of Education v. Rowley*, 458 U.S. 176 (1982), does not condone schools' providing children with disabilities a "merely more than de minimis" educational benefit. That standard appears nowhere in this Court's opinion. And for all of the School District's bluster regarding the Spending Clause, the School District ultimately uses the same interpretive method to construe the IDEA that petitioner uses. Like petitioner, the School District starts with the text, then consults the statute's purposes and structure, neither of which the School District asserts is unclear. Finally, the School District evaluates the administrability of competing rules. In the end, therefore, the only real dispute is whose position embodies a correct reading of the Act.

Petitioner's does. The words "appropriate public education" in the FAPE requirement signal a transmission of academic proficiency and valuable skills for participating in a complex society. That meaning is crystallized in the IDEA's objectives and FAPE-implementing provisions—most notably, the rules governing IEPs and requiring testing and accountability keyed to grade-level curriculum. Taken together, these objectives and rules dictate that schools must afford children with disabilities substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society.

The School District concedes that these same statutory provisions inform the FAPE requirement, relying on them to show that schools typically will seek educational success for children with disabilities. But the School District tries to strip

these FAPE-implementing rules of their private enforceability by labeling them as mere "procedural" directives. They are not. They are the core of the substantive obligation the Act imposes, the bridge to the meaningful public education guaranteed to every child with a disability. Accordingly, the IDEA's FAPE-implementing provisions cannot be satisfied by simply "think[ing] about" giving a child instruction and skills to succeed in the general curriculum and outside the classroom (Resp. Br. 40), but then adopting an IEP designed to deliver far less: only a barely-more-than-trivial educational benefit.

The "substantially equal opportunity" standard also is more workable than the School District's test. It gives due weight to schools' educational expertise and measures their actions against readily available benchmarks in each school's general curriculum. As the School District and its amici implicitly acknowledge, the "substantially equal opportunity" standard also captures what IEP teams generally are already doing on the ground. By contrast, the School District's "merely more than de minimis" standard is untethered to any objective criteria. The meager expectations it transmits are at odds with what educators themselves say they understand their roles to be. It therefore makes no sense to anchor IEP meetings across the country (or resolution of any dispute that ensues) to that standard.

ARGUMENT

I. *Rowley* does not support a "merely more than de minimis" benefit standard.

Echoing its position at the certiorari stage, the School District begins by asserting that "*Rowley* held that the IDEA does not impose *any* substantive

standard prescribing the level of education to be accorded children with disabilities." Resp. Br. 14 (internal quotation marks and citation omitted; emphasis added); *accord* Supp. BIO 9. But the School District quickly abandons that position, conceding on the next page that *Rowley* held that the IDEA "requires States to offer services sufficient to permit a child to benefit from special education." Resp. Br. 15 (internal quotation marks and citation omitted; emphasis removed).

To define that level of "benefit," the School District assembles various quotations from *Rowley* to contend that the IDEA imposes a "some benefit" standard—which the School District defines as a requirement "to provide a benefit that is 'more than de minimis.'" Resp. Br. 15 38 (quoting Pet. App. 16a). This argument misreads *Rowley*, particularly in light of the IDEA's 1997 and 2004 amendments.

1. *Rowley* nowhere says school districts satisfy the IDEA so long as they provide a "merely more than de minimis" educational benefit. And only once does it use the phrase "some educational benefit." *See* 458 U.S. at 200. That single turn of phrase does not support the School District's position, let alone establish a "definitive[]" construction of the IDEA. Resp. Br. 13.

The "some educational benefit" phrase appears at the beginning of a subsection of *Rowley* confirming that the FAPE requirement imposes more than just a set of procedures. "Implicit in the congressional purpose of providing access to a 'free appropriate public education,'" this Court explained, "is the requirement that the education to which access is provided be sufficient to confer some educational

benefit upon the handicapped child." *Rowley*, 458 U.S. at 200. But, as the Court immediately made clear, this reference to "some benefit" was not meant to settle the standard for determining "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act." *Id.* at 202. Amy Rowley was receiving an education allowing her to "perform[] above average in the regular classrooms of a public school system," so the Court "confin[ed] [its] analysis to that situation" and held she had received a FAPE. *Id.*; *see also id.* ("We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.").

Viewed in context, therefore, *Rowley*'s reference to "some educational benefit" simply declares that a child with a disability is entitled to an education from which the child will profit. It does not establish a "merely more than de minimis" benefit as the Act's substantive command. To the contrary, *Rowley* explains that whatever exactly a FAPE might require, it "should be reasonably calculated to enable" children such as Amy Rowley, who are being educated in regular classrooms, "to achieve passing marks and advance from grade to grade." 458 U.S. at 204. Providing a "merely more than de minimis" educational benefit will seldom enable a child to achieve grade-level competency and thus pass from grade to grade. Petr. Br. 30-31; U.S. Br. 34.

Nor can the School District's standard be squared with *Rowley*'s insistence that the IDEA requires "access to public education" to be "meaningful." 458 U.S. at 192. In *Alexander v. Choate*, 469 U.S. 287 (1985), this Court explained—in

language almost identical to *Rowley*—that the Rehabilitation Act of 1973 requires states to provide "meaningful access to the benefit" involved. *Id.* at 301. The federal government and lower courts have understood this explanation to require states to "afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement" as persons without disabilities. 45 C.F.R. § 84.4(b)(2); *see Argenyi v. Creighton Univ.*, 703 F.3d 441, 449 (8th Cir. 2013) (surveying case law and agreeing with other circuits adopting that standard). Neither this Court nor any other has suggested that "meaningful access" in that context allows states to provide "merely more than de minimis" benefits. The same should be true here.

The School District's only response is that the IDEA's "meaningful access" demand applies solely to providing "related services"—such as interpretive services designed to enable a child to spend more time in the mainstream classroom—not to instruction itself. Resp. Br. 21-22. But, as *Rowley* makes clear, the "meaningful access" requirement applies generally to the Act's "substantive educational standard" for FAPE. 458 U.S. at 192; *see also* 34 C.F.R. § 300.39(b)(3)(ii) (schools must "ensure *access* of the child *to the general curriculum*, so that the child can meet the educational standards . . . that apply to all children") (emphasis added). And the School District does not, and cannot, claim a just-above-trivial benefit provides a substantively "meaningful" education.

2. The 1997 and 2004 amendments to the IDEA cement this analysis. The *Rowley* opinion—grounding

itself in the flexible statutory term "appropriate"—makes clear that educational programs for children with disabilities "should be formulated in accordance with the requirements of the Act" and consistent with "the goal[s] of the Act." *Rowley*, 458 U.S. at 198, 203-04 (quotation marks and citation omitted). The Act's FAPE-implementing requirements and overall goals, as augmented by the 1997 and 2004 amendments, dictate that aiming for a "merely more than de minimis" educational benefit is impermissible. *See* Petr. Br. 36-40; Br. of Nat'l Ass'n of State Directors of Special Educ. 6-12; Br. of Nat'l Disability Rights Network 21-35. The Act, in its current form, requires schools to provide children with disabilities with opportunities substantially equal to those they provide to all other students so that they can achieve academic success, attain self-sufficiency, and contribute to society. Petr. Br. 40-43.

Faced with the 1997 and 2004 amendments' undeniably "greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education," *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (quotation marks and citation omitted), the School District is tellingly circumspect. It ignores *Rowley*'s directive to construe the substantive FAPE requirement in harmony with the IDEA's implementing provisions and objectives. And the School District implicitly accepts this Court's case law instructing that when Congress uses the term "appropriate," the term draws meaning from the legislation's purposes and provisions as a whole. Resp. Br. 32 (citing *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983)). The School District also implicitly accepts that the meaning of "appropriate" evolves as

other requirements of the statute evolve. Resp. Br. 33 (citing *West v. Gibson*, 527 U.S. 212 (1999)); *see also* Petr. Br. 19, 35-36 (discussing *Ruckelshaus* and *West*).

To be sure, the School District contends that, even after the 1997 and 2004 amendments, the IDEA's implementing provisions and objectives do not imbue the FAPE requirement with the meaning petitioner ascribes to them. Resp. Br. 23, 33. Petitioner will respond to that argument momentarily. But for now, it suffices to pin down that insofar as the 1997 and 2004 amendments impose substantive requirements at odds with a "merely more than de minimis" standard, *Rowley* cannot be read to require that test here.

Congress's amendments to the IDEA similarly answer the School District's argument that the IDEA cannot impose the "substantially equal opportunity" test because *Rowley* "reject[ed] any standard based on equality of opportunity," Resp. Br. 18. *Rowley* held merely that the Act does not require "*strict* equality of opportunity." 458 U.S. at 198 (emphasis added); *see also* Petr. Br. 42. In any event, following the enactment of the Americans with Disabilities Act of 1990, the plain language of the Act now declares a "national policy of *ensuring equality of opportunity*, full participation, independent living, and economic self-sufficiency for individuals with disabilities" that requires "[i]mproving educational results for children with disabilities." Pub. L. No. 105-17, § 601(c)(1), (3), 111 Stat. 37, 38-39 (1997) (now codified at 20 U.S.C. § 1400(c)(1)) (emphasis added); *see also* Br. of Nat'l Disability Rights Network 15-16 (elaborating linkage between the ADA and the IDEA's amendments). And

the 1997 and 2004 amendments—unlike the original version of the IDEA—require schools to strive to educate, test, and prepare children with disabilities for post-secondary-school living consistent with the opportunities provided to their peers without disabilities. Petr. Br. 36-40. These amendments demonstrate that a "free appropriate public education" should be calibrated to provide substantially equal opportunities, not a modicum of educational "benefit."

II. The Spending Clause does not support a "merely more than de minimis" standard.

1. The School District criticizes petitioner for omitting explicit reference to the Spending Clause, and it infuses its brief with the rhetoric of the clear-notice rule. But the School District analyzes the IDEA's FAPE requirement using the same method as petitioner. The School District starts with the statutory definition. *Compare* Resp. Br. 28-29, 37-38, *with* Petr. Br. 16-19, 41. It then turns to "the statute's structure and purpose"—just as petitioner does—and claims its substantive standard "flows from" those sources. *Compare* Resp. Br. 37-51, *with* Petr. Br. 19-29, 40-43. Indeed, when push comes to shove, the School District acknowledges that the Act's provisions for crafting IEPs directly and explicitly inform the FAPE requirement—again, just as petitioner maintains. *Compare* Resp. Br. 46-47, *with* Petr. Br. 21-24.

This agreement on methodology is as it should be. As noted above, *Rowley* looked to all of these sources, as well as the Act's legislative history, and indicated they all provided adequate notice to states receiving IDEA funds. *See supra* at 6; *see also*

Rowley, 458 U.S. at 204 n.26 (disregarding only "isolated statements in the legislative history" that contravened the IDEA's "language and the balance of its legislative history"). Subsequent IDEA cases have done so as well. *See, e.g.*, *Forest Grove*, 557 U.S. at 244-46 (rejecting school district's reading of IDEA because it was "at odds with . . . [t]he express purpose of the Act" and its implementing provisions).

Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981), on which the School District relies (Resp. Br. 35), conducted the same sort of analysis. *Pennhurst* concerned whether a federal statute imposed a legally enforceable obligation to provide appropriate treatment to individuals with developmental disabilities. The Court held that the statute did "no more than express a congressional *preference* for certain kinds of treatment." 451 U.S. at 19 (emphasis added). But the Court reached that conclusion—just as it has in other Spending Clause cases—by consulting the "language and structure," history, and "purposes of the Act." *See id.* at 18. And here, the IDEA indisputably imposes a legally enforceable obligation to provide a FAPE; the question is simply how the Act's language, structure, history, and purposes define that substantive obligation.[1]

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[1] Because the statutory analysis in this case is the same regardless of whether the Spending Clause applies, this Court need not decide whether the IDEA rests independently on Congress' power to legislate under "§ 5 of the Fourteenth Amendment." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 305 (2006) (Ginsburg, J., concurring in part and concurring in the judgment). A strong argument exists that it

2. That leaves the School District's contention that the Spending Clause can require no more than a "merely more than de minimis" educational benefit because the higher standards advanced by petitioner, the United States, and some amici use different language from one another. Resp. Br. 27. This is like arguing that the various formulations this Court has used over the years to describe the "probable cause" standard, *see Ornelas v. United States*, 517 U.S. 690, 695-96 (1996), tells magistrates nothing more than that they may not issue warrants based on trifling evidence of wrongdoing. In other words, the School District's argument is nonsense.

Petitioner and the United States agree that a school district must offer far more than a benefit that is just above trivial. And they agree that a school must aim for grade-level competence for students who are in the regular classroom. They further agree that schools must offer a comparably rigorous program for students who are either too far behind to benefit fully from grade-level instruction without instruction on prerequisite skills or have such serious disabilities that an alternative benchmark is required. *See* Petr. Br. 43-48; U.S. Br. 23-27.

Variations in the precise terminology necessary to capture these fundamental areas of agreement do not permit this Court to ratchet the IDEA's substantive mandate all the way down to a "merely more than de minimis" standard. "In accepting IDEA

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does. *See id.*; *Rowley*, 458 U.S. at 198 (noting that the IDEA is designed to enforce the states' obligation "to provide equal protection of the laws") (quotation marks and citation omitted).

funding, States expressly agree to provide a [free appropriate public education] to all children with disabilities." *Forest Grove*, 557 U.S. at 246. And the IDEA's text, statutory objectives, and FAPE-implementing provisions inform what is and is not "appropriate" under the Act. The only real issue is whether petitioner's articulation (or the Government's substantially similar articulation) of what those sources dictate is correct, or whether the School District's alternative interpretation of those sources is accurate. We now turn to that issue.

III. The IDEA's text, purposes, and implementing provisions require much more than a just-above-trivial educational benefit.

Try as it might, the School District is unable to ground its "merely more than de minimis" standard in the text, purposes, or structure of the IDEA.

1. *Text.* The School District claims that the IDEA requires nothing more than a "merely more than de minimis" educational benefit because the Act mandates that children with disabilities receive "special education and related services," 20 U.S.C. § 1401(9), and "related services" are defined as things "required to assist a child with a disability *to benefit* from special education," *id.* § 1401(26) (quoted in part at Resp. Br. 37 (emphasis added by School District)).

The School District's reasoning is misguided. The IDEA's "related services" definition is distinct from the overall statutory requirement that schools provide a certain "level of education." *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 79 (1999). And even in that definition, "benefit" is used as a verb, not a noun. "Related services" are merely

various *means*—things like "transportation," hearing aids, and iPads, 20 U.S.C. § 1401(26)—allowing children to benefit from the education the IDEA requires, not the education itself.

This brings us back to the original requirement to provide "an appropriate . . . education . . . in conformity with [an IEP]." 20 U.S.C. § 1401(9)(C)-(D). The word "education" signals not some minor benefit, but a comprehensive inculcation of skills necessary to prepare children to live in, and contribute to, society. Petr. Br. 17-19. The words "appropriate" and "in conformity with [an IEP]" direct us to "other sources" to complete the definition of the Act's substantive requirement, *Ruckelshaus*, 463 U.S. at 683—specifically, the purposes of the IDEA and its FAPE-implementing requirements.

2. *Purpose.* The School District acknowledges there is "no doubt that Congress wanted to improve educational results and replace low expectations with high ones." Resp. Br. 48. Beyond that, the School District has little to say about the IDEA's goal of ensuring all children receive an "effective[]" education, 20 U.S.C. § 1400(d)(4), and Congress's related finding that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities," *id.* § 1400(c)(1); *see also id.* § 1400(d)(1); Petr. Br. 20 (citing cases explaining that statutory purposes and findings imbue an operative term such as "appropriate" with meaning).

This is not surprising. No reasonable official charged with educating children could think that a

statute with these objectives allows schools to seek just-above-trivial educational advancement. Indeed, as the School District's amici make clear, no school official does think that. *See, e.g.*, Br. of Nat'l School Boards Ass'n 16-17.

3. *Structure.* The IDEA's FAPE-implementing provisions confirm that the Act requires far more than a just-above-trivial benefit. The School District acknowledges these provisions are "finely reticulated," "exacting," and "systemic." Resp. Br. 38-39; *see also* Br. of AASA, Sch. Superintendents Ass'n 15 (these provisions "make[] clear . . . that school districts *must* aim high"). In other words, there is no fair-notice problem here. But the School District says the provisions are irrelevant to the "substantive standard" the IDEA imposes because they are purely "procedural." Resp. Br. 38-39. So long as the team crafting an IEP "think[s] about," "focus[es] on," or "keep[s] in mind" the provisions governing IEPs, the school necessarily provides a FAPE regardless of what the school actually tries to teach the child in the classroom. *Id.* at 40; *see also id.* at 41 (these provisions "compel[]" only "informed deliberation").

Not so. The FAPE-implementing provisions clearly impose substantive obligations. To begin, the Act says that a FAPE must be "provided in conformity with the individualized education program required under section 1414(d)." 20 U.S.C. § 1401(9)(D). The IEP program, in turn, requires an IEP to "include[]":

- "measurable annual goals . . . designed to . . . enable the child to be involved in and make progress in the general education curriculum";

- a summary of the "special education and related services[,] . . . based on peer-reviewed research to the extent practicable," that will enable the child "to be involved in and make progress in the general education curriculum";
- "a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments" applicable to all students (or, in the case of a child with a serious disability, an appropriate "alternate" assessment);
- beginning "when the child is 16," "postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills."

Id. § 1414(d)(1)(A)(i)(II), (IV), (VI), (VIII). Finally, "[t]he local educational agency shall ensure" that the IEP is reviewed and "revise[d]" "periodically," "as appropriate to address any lack of expected progress toward the annual goals and in the general education curriculum." *Id.* § 1414(d)(4)(A).

None of these requirements can be satisfied, as the School District would have it, simply by an IEP team's "think[ing] about" Section 1414(d)'s requirements. The IDEA and its FAPE-implementing provisions compel schools to put substantive goals directly in IEPs—goals keyed to the general curriculum. *See* U.S. Br. 18-19, 31-32. The statute then requires schools to provide education "in conformity" with those goals, 20 U.S.C. § 1401(9)(D), and to revise IEPs as necessary to stay on track. If a

school fails to do so, a child can obtain relief on the "substantive ground[]" that the school has denied him a FAPE, or otherwise "caused a deprivation of educational benefits" the IDEA guarantees. 20 U.S.C. § 1415(f)(3)(E)(i), (ii)(I), (ii)(III).

When pressed, the School District and its amici ultimately admit as much. Under a process-only view of the IEP requirements, it would be perfectly fine for an IEP team to provide specialized services to a child for only certain subjects, so long as the IEP team thought seriously about providing the child such services for every subject. It likewise would be acceptable, under a process-only view, for a school to refuse a parent's request to provide a readily available, peer-reviewed alternative to an outdated service currently giving a child only a minimal benefit, so long as the IEP team discussed the existence of the IDEA's preference for services based on peer-reviewed research. *See* 20 U.S.C. § 1414(d)(1)(A)(i)(IV). Yet, confronted with scenarios like these, the School District says that "the statute plainly prohibit[s]" such outcomes. Resp. Br. 46-47. Its amici agree. *See, e.g.*, Br. of AASA, Sch. Superintendents Ass'n 19 ("To maintain conformity with the IDEA and ESEA, then, educators simply cannot . . . aim to barely clear the bar by seeking minimal benefit and limited progress for students with disabilities.").

If the School District and its amici are right about that (and petitioner and the United States agree that they are), then the School District cannot also be right that the FAPE-implementing provisions do nothing more than "set[] up a process of reasoned decisionmaking," Resp. Br. 42. These "finely

reticulated" provisions inform the IDEA's "substantive" obligation to provide "sufficient educational benefits to satisfy the requirements of the Act." *Rowley*, 458 U.S. at 202, 205-06; *see also* Petr. Br. 33 (citing other case law).

IV. The "substantially equal opportunity" standard best meets the administrative needs of the Act's stakeholders.

1. The School District attacks the workability of the "substantially equal opportunity" standard. Resp. Br. 51-54, 58-59. But that standard outperforms the School District's standard on every metric.

a. The "substantially equal opportunity" standard is plainly less "vague and amorphous," Resp. Br. 51 (quotation marks omitted), than the School District's "some benefit" standard. All agree that the most important decision makers here are the IEP teams that craft individual IEPs. The "substantially equal opportunity" standard gives those teams a set of readily identifiable benchmarks. As the IDEA directs, the standard tells IEP teams that they should set goals aimed at achieving the educational targets in the school's "general education curriculum"—the reference point that establishes what all children are expected to learn and be able to do at each grade level. 20 U.S.C. § 1414(d)(1)(A)(i)(II); *see also id.* § 1414(d)(1)(B)(ii) (mandating, for this reason, that the IEP team include at least one "regular education teacher"). In *Rowley*'s words, the school must aim, to the extent practicable, to provide a child with a disability with an education "reasonably calculated to enable the child to achieve

passing marks" in that curriculum "and advance from grade to grade." 458 U.S. at 204.[2]

In the "relatively small number" of cases that generate litigation, U.S. Br. 28; *see also* Petr. Br. 4, courts easily can follow these guideposts as well. Courts have ample experience administering tests very much like the "substantially equal opportunity" standard. As noted above, the federal government and federal appellate courts have concluded that the Rehabilitation Act requires states to abide by a test along these lines. *See supra* at 4-5. Federal courts of appeals also have applied a similar test in cases under Title III of the ADA, which requires states to ensure that people with disabilities have "full and equal enjoyment" of public accommodations, including schools. 42 U.S.C. § 12182(a). *See, e.g.*, *Argenyi v. Creighton Univ.*, 703 F.3d 441, 449 (8th Cir. 2013); *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir. 2012).

By contrast, it is hard to think of a more "vague and amorphous" standard than the one the School

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[2] The School District claims confusion over where to look to find the "general education curriculum" that serves as the point of comparison here. Resp. Br. 53. But the School District's own "Guaranteed and Viable Curriculum" is posted online and describes in great detail "what students need to know and be able to do." Douglas County Sch. Dist., *GVC*, https://www.dcsdk12.org/world-class-education/gvcs##. This is typical. A school's general education curriculum is usually developed at the district level and must comport with "the standards of the State educational agency." 20 U.S.C. § 1401(9)(B) (FAPE definition); *see also id.* § 1412(a)(1), (a)(11) (requiring local practices for educating children with disabilities to satisfy statewide standards).

District promotes to encapsulate the "merely more than de minimis" test: "some benefit." That standard is not tied to any guidepost, and the word "some" is about as nebulous as any in the English language. *See* Petr. Br. 31. The only way the "some benefit" standard could provide any real guidance would be if it meant simply that IEPs need not try to achieve anything at all because the IDEA is really just a procedural law. But, after initially gesturing in that direction, *see* Resp. Br. 14, the School District assiduously denies this is its position, *see id.* 46-47. It is at pains to the last page of its brief to emphasize that courts must "tailor their analysis to the individualized circumstances of each case" and "discern the difference between *some* benefit and a benefit that is merely *de minimis*," *id.* 59. How IEP teams and courts can reliably do that, with no substantive touchstones to guide them, is left unsaid.

b. The "substantially equal opportunity" standard also does a better job than the School District's standard of keeping courts from "substitut[ing] their own notions of sound educational policy for those of the school authorities," *Rowley*, 458 U.S. at 206. Because the "substantially equal opportunity" standard measures a school's efforts to educate a child with a disability against the methodologies and goals the school district has already set respecting other children, courts do not have to decide what pedagogies or educational objectives are suitable or proper. Nor do courts have to determine the best way to pursue those pedagogies and objectives with respect to a particular child with a disability. *See* Petr. Br. 49 (noting that the question presented here is distinct from whether courts should defer to school officials' determinations). If litigation

arises, courts need only determine—using traditional tools used to evaluate equality claims—whether the school's actions were "reasonably calculated," *Rowley*, 458 U.S. at 204, to provide opportunities to the child with a disability equivalent to those it affords to other children in the school district.

On the other hand, the School District's "some benefit" test offers judges no guidance regarding what educational practices a school should be implementing or what post-secondary goals it should be pursuing. Even peer-reviewed research—which, as noted above, each child's IEP must be "based on" wherever practicable, 20 U.S.C. § 1414(d)(1)(A)(i)(IV)—is apparently not a necessary compass. *See supra* at 13-15. Faced with such an undefined playing field, courts would have no choice but to decide for themselves what educational practices and objectives *they* think are needed to provide a "more than de minimis" educational "benefit."

c. The "substantially equal opportunity" standard, in contrast to the "merely more than de minimis" test, tracks what most schools are already generally doing for students in the real world. *See* Br. of Nat'l Ass'n of State Directors of Special Educ. 6-12; Br. of Former Officials of the U.S. Dep't of Educ. 10-25; Br. of Disability Rights Orgs. & Public Interest Ctrs. 28-38. Even if educational officials do not use petitioner's precise terminology, most of them "are already aiming high." Br. of AASA, Sch. Superintendents Ass'n 4. Moreover, experience has shown that "setting high expectations for students with disabilities . . . , in fact, *works*." Br. of Nat'l Ass'n of State Directors of Special Educ. 11; *see also*

Br. of Nat'l School Boards Ass'n 6-7, 16-17 (special education programs aiming above "a 'more than de minimis' legal standard" have been "successful").

The School District counters that the "merely more than de minimis" standard has been "on the books" in the Tenth Circuit and certain other jurisdictions "for decades." Resp. Br. 58. True enough. But even in those jurisdictions, not one organization or educational official appearing here claims to aim for that meager standard. To the contrary, the National Association of State Directors of Special Education reports that "all" its members providing information have "expressed their belief that a standard more meaningful than just-above-trivial is the norm today." Br. of Nat'l Ass'n of State Directors of Special Educ. 9. The National Association of School Boards likewise reports that "IEP teams are *not* basing their recommendations on the goal of meeting a 'more than *de minimis*' legal standard." Br. of Nat'l School Boards Ass'n 17 (emphasis added).

That educators—even when given the chance—say they decline to aim as low as the School District says the law allows speaks volumes about the School District's test. This Court should not now christen a just-above-trivial standard simply to bail out a school, such as respondent, that plainly fell short of its IDEA obligations. Doing so would only invite more schools to do the same.

2. Although the question presented asks only what the proper standard is, the School District also challenges petitioner to apply the "substantially equal opportunity" standard to the facts of this case. Resp. Br. 54-56. That is a strange demand. The School District does not claim its efforts satisfied

petitioner's standard. Furthermore, this Court is one "of review, not of first view." *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). So even if the parties actually disagreed over whether the School District satisfied the "substantially equal opportunity" test, this Court's "ordinary practice" would be to remand so the lower courts could reconsider petitioner's claim "under the proper standard," *id.*

Be that as it may, we briefly explain how the School District fell short of its statutory obligations in dealing with Drew's educational needs. First and foremost, the School District should not have kept trying to educate Drew through instructional practices that obviously were not working. *See* Petr. Br. 8-10. When the academic goals in IEPs stay the same year after year, it is clear that new strategies are needed. In addition, the School District should have conducted a behavioral assessment to identify the sources of the specific behaviors that interfered with Drew's ability to function at school and to help the IEP team select interventions to directly address them. As the Department of Education's commentary to its regulations explains, "a failure to . . . address [behaviors impeding learning] in developing and implementing the child's IEP" constitutes "a denial of FAPE." 34 C.F.R. pt. 300, app. A, § IV, at 115.

Looking forward, the School District should have established academic goals for Drew as close as reasonably possible to the grade-level goals for other students in the school. The School District also should have assessed his aptitude for self-sufficiency and participating in social activities outside of school.

Based on those assessments, the School District should have offered Drew an IEP and educational and related services designed to meet those goals. The School District was not required to adopt any one specific educational practice or behavioral therapy. Educators and other experts can reasonably disagree on specific courses of action. But the IDEA did not permit the School District simply to propose a fifth-grade IEP that "was similar in all material respects to Drew's past IEPs" that had so obviously and woefully failed. Pet. App. 15a.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Jeffrey L. Fisher
David T. Goldberg
Pamela S. Karlan
SUPREME COURT
LITIGATION CLINIC
William S. Koski
YOUTH AND EDUCATION
LAW PROJECT
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, CA 94305

Jack D. Robinson
Counsel of Record
SPIES, POWERS &
ROBINSON, P.C.
950 South Cherry Street
Suite 700
Denver, CO 80246
(303) 830-7090
robinson@sprlaw.net

Brian Wolfman
Wyatt G. Sassman
GEORGETOWN LAW
APPELLATE COURTS
IMMERSION CLINIC
600 New Jersey Ave., NW
Washington, DC 20001

December 30, 2016

AND
BRIEFS

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IN THE
Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

W. STUART STULLER
CAPLAN AND EARNEST LLC
1800 BROADWAY, SUITE 200
BOULDER, CO 80302

DANIEL D. DOMENICO
KITTREDGE LLC
3145 TEJON STREET, #D
DENVER, CO 80211

NEAL KUMAR KATYAL
Counsel of Record
FREDERICK LIU
EUGENE A. SOKOLOFF
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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IN THE

Supreme Court of the United States

No. 15-827

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

INTRODUCTION

The United States has filed a brief recommending that this Court grant the petition and reverse the Tenth Circuit for repeating what this Court and at least eight other circuit courts have said for decades: The IDEA sets forth extensive *procedural* requirements designed to provide disabled children with access to a free appropriate public education (FAPE). To the extent the Act subjects the States to any *substantive* standard, it calls for no more than a rational-basis-type review to ensure that the education to which access is provided is reasonably calculated to confer more than a *de minimis* educational benefit.

The Government argues (at 8) that this case implicates an "entrenched and acknowledged" circuit split. But the split is shallow; only the Third Circuit has consistently applied a purportedly more demanding "meaningful benefit" standard. And it is undeveloped; the Government can only speculate whether the choice of standard would be outcome-determinative in this (or any other) case because the Third Circuit has never clearly explained what distinguishes "more than *de minimis*" from "meaningful" benefits. That makes this case an exceptionally poor vehicle to decide the question if the Court were inclined to address it.

In any event, the Government's argument conflicts with this Court's precedent and the statutory text. The IDEA contains *no* "substantive standard prescribing the level of education to be accorded handicapped children." *Bd. of Educ. of Hendrick Hudson Cen. Sch. Dist.* v. *Rowley*, 458 U.S. 176, 189 (1982). It was not intended to "displace the primacy of States in the field of education." *Id.* at 208. Rather, "Congress sought primarily to make public education *available* to handicapped children." *Id.* at 192 (emphasis added). Thus, for over thirty years, this Court has held that if a State provides a program "reasonably calculated to enable the child to receive educational benefits," then it "has complied with the obligations imposed by Congress and the courts can require no more." *Id.* at 206-207. That is why the vast majority of circuits have upheld individualized education plans (IEPs) reasonably calculated "to confer *some* educational benefit." *Id.* at 200 (emphasis added).

The Government contends (at 19) that the IDEA demands something "more robust." It argues (at 13-

14) that access to a public education is not meaningful unless the benefit provided by that education is "meaningful," as well. But that is not what Congress said in the IDEA. *See Rowley*, 458 U.S. at 189 (finding *any* substantive standard "[n]oticeably absent" from the Act). And that makes it hard to reconcile the Government's approach with Congress's reliance on the Spending Clause to pass the Act. This Court has held that States cannot be bound by conditions they have not accepted "'voluntarily and knowingly.'" *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 295-296 (2006) (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). And "States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Id.* It is hard to imagine how the States can be expected to divine a standard that not even the Federal Government can spell out.

Nor is the Government's "meaningful benefit" standard necessary. The IDEA achieves its aims through "elaborate and highly specific procedural safeguards," *Rowley*, 458 U.S. at 205, which mandate individualized consideration of each child's unique needs. There is no evidence to support the Government's insinuation (at 13 and 20-21) that children with disabilities in the First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, or Eleventh Circuits suffer from inferior opportunities. Educators in those forty-two States are no less dedicated to ensuring that their schools offer supportive and nurturing learning environments for children with disabilities than their counterparts in the Third Circuit.

ARGUMENT

I. THE ASSERTED SPLIT IS SHALLOW AND UNDEVELOPED

1. In the three decades since *Rowley*, nine different federal courts of appeals have read that case the same way. Those courts have held that a State provides a FAPE when it allows a child with a disability to receive a non-trivial benefit from her public education.*

A few decisions have used the phrase "meaningful benefit" to describe the *Rowley* standard. But most appear to agree with the Fourth Circuit that "[u]sing 'meaningful,' as the Court also did in *Rowley*, [i]s simply another way to characterize the requirement that an IEP must provide a child with more than minimal, trivial progress." *O.S.* v. *Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015); *see also Rockwall Indep. Sch. Dist.* v. *M.C.*, 816 F.3d 329, 338 (5th Cir. 2016) ("[T]he educational benefit cannot be a mere modicum or *de minim*[*i*]*s* * * * . In short, the educational benefit * * * must be 'meaningful.'")

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* *See, e.g.*, *D.B. ex rel. Elizabeth B.* v. *Esposito*, 675 F.3d 26, 34 (1st Cir. 2012); *P. ex rel. Mr. & Mrs. P.* v. *Newington Bd. of Educ.*, 546 F.3d 111, 119 (2d Cir. 2008); *O.S.* v. *Fairfax Cty., Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015); *Cypress-Fairbanks Indep. Sch. Dist.* v. *Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998); *Todd* v. *Duneland Sch. Corp.*, 299 F.3d 899, 905 n.3 (7th Cir. 2002); *K.E. ex rel. K.E.* v. *Indep. Sch. Dist. No. 15*, 647 F.3d 795, 810 (8th Cir. 2011); *J.L.* v. *Mercer Island Sch. Dist.*, 592 F.3d 938, 951 n.10 (9th Cir. 2009); *cf. Thompson R2-J Sch. Dist.* v. *Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1149 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009); *JSK ex rel. JK* v. *Hendry Cty. Sch. Bd.*, 941 F.2d 1563, 1572-73 (11th Cir. 1991).

(internal quotation marks omitted); *D.B. ex rel. Elizabeth B.* v. *Esposito*, 675 F.3d 26, 34-35 (1st Cir. 2012) (similar). As the Ninth Circuit put it, "'educational benefit,' 'some educational benefit' or a 'meaningful' educational benefit * * * all * * * refer to the same standard." *J.L.* v. *Mercer Island Sch. Dist.*, 592 F.3d 938, 951 n.10 (9th Cir. 2009).

2. The United States contends (at 10) that the Third and Sixth Circuits have gone farther. But that is far from clear. The split with the Sixth Circuit is dubious at best. It is true that the Sixth Circuit approvingly cited some Third Circuit cases applying a "meaningful" benefit standard in *Deal* v. *Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005). But it has never mentioned that standard in a published opinion since. Indeed, when *Deal* returned to the Sixth Circuit after remand, the court emphasized that its earlier opinion "stated the general rule that 'a school district is only required to provide educational programming that is reasonably calculated to enable the child to derive more than *de minimis* educational benefit.'" *See Deal* v. *Hamilton Cty. Dep't of Educ.*, 258 F. App'x 863, 865 (6th Cir. 2008) (per curiam) (quoting *Deal*, 392 F.3d at 861). And the sole (unpublished) decision in the decade since to even mention the "meaningful" standard appears to understand that term to mean simply more than "trivial." *See Woods* v. *Northport Pub. Sch.*, 487 F. App'x 968, 974-975 (6th Cir. 2012); *Nack ex rel. Nack* v. *Orange City Sch. Dist.*, 454 F.3d 604, 614 (6th Cir. 2006) ("[T]he IDEA does not guarantee success—it only requires a school to provide sufficient specialized services so that the student benefits from his education." (internal quotation marks

omitted)). The Sixth Circuit has thus quietly rejoined the ranks of those courts that use "meaningful" "as simply another way to characterize the requirement that an IEP must provide a child with more than minimal, trivial progress." *O.S.*, 804 F.3d at 359.

If the split with the Sixth Circuit is doubtful, the split with the Third Circuit is far from clear. That court has held that "the provision of merely more than a trivial educational benefit does not meet" its "meaningful benefit requirement." *T.R.* v. *Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (brackets and internal quotation marks omitted). That *sounds* more rigorous than the majority view. But there is no way to know for sure because the Third Circuit has never had occasion to explain what kinds of record facts establish that a benefit is sufficient. And until it does so, there is no way of telling whether the purported difference in the standards constitutes a true split.

Despite the lack of guidance from the Third Circuit, the Government asserts (at 20) that the choice of standard "can" be outcome-determinative. But the only example the Government identifies is a case in which the Third Circuit *vacated* a district court decision for applying a different standard. *See* U.S. Br. 20 (citing *Ridgewood Bd. of Educ.* v. *N.E. ex rel. M.E.*, 172 F.3d 238, 243 (3d Cir. 1999)). Vacatur says nothing about whether the choice of standard would have affected the merits, and the court's opinion does not speculate either way. *Cf., e.g.*, *T.R.*, 205 F.3d at 577 (affirming district court that applied a "nontrivial benefit" standard on grounds the record showed the IEP "amply satisfie[d] the somewhat more stringent 'meaningful benefit' test"). Thus,

while it is true that the Tenth Circuit called this a "close case," Pet. App. 23a, the Government has not identified any reason to believe that applying the Third Circuit's something-more-than-non-trivial standard would have yielded a result different from the majority, non-trivial standard.

3. That basic difficulty may be why the Court has denied petitions for certiorari presenting the question here at least three times since *Rowley* was decided, including in a case from the Tenth Circuit. *See Thompson R2-J Sch. Dist.* v. *Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1149 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009); *Deal*, 392 F.3d 840, *cert. denied*, 546 U.S. 936 (2005); *Polk* v. *Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 183 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989).

If the Court is interested in this issue, it should await a case in which the Third Circuit reverses a district court for misapplying the "meaningful benefit" standard. A case in that posture—unlike the decision below—might prompt the Third Circuit to give some content to its rule and provide the Court with a factual record on which it could assess the impact of that standard and whether it comports with *Rowley* and the statute.

II. THE DECISION BELOW WAS CORRECT

Relying on *Thompson*—a decision this Court chose not to review just seven years ago—the Tenth Circuit reiterated that a State provides a FAPE when it offers specialized instruction and related services reasonably calculated to provide "some educational benefit," defined as "more than [a] *de minimis*" benefit. Pet. App. 16a. That standard is compelled by *Rowley* and the statutory text.

1. Congress enacted the IDEA to ensure that children with disabilities in participating States receive a "free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). To that end, the IDEA sets forth comprehensive "procedures" that States, school districts, and educators must follow in developing an IEP. *Rowley*, 458 U.S. at 205-206. Among other things, educators must conduct a "full and individual initial evaluation" of the child and her developmental needs. 20 U.S.C. § 1414(a)(1)(A). They must set "measurable annual goals * * * designed to * * * enable the child to be involved in and make progress in the general educational curriculum." *Id.* § 1414(d)(1)(A)(i)(II). And they must identify the services that will allow the child "to advance appropriately toward attaining the annual goals," and "to be educated and participate with other children with disabilities and nondisabled children in [various] activities." *Id.* § 1414(d)(1)(A)(i)(IV). Together, the IDEA's procedural requirements ensure that a child's "access to public education" is "meaningful." *Rowley*, 458 U.S. at 192.

The statute contained similar requirements at the time *Rowley* was decided, *see id.* at 182-183, and it was against the backdrop of these procedural protections that the Court in *Rowley* considered whether States must meet "some additional *substantive* standard." *Id.* at 190 (emphasis added). The Court observed that any such standard is "[n]oticeably absent from the language of the statute." *Id.* at 189. And it concluded that the statute's structure and history demonstrate Congress's "conviction that adequate compliance with the *procedures* prescribed would in most cases assure much if not all of what Congress wished in the way of *substantive* content in

an IEP." *Id.* at 206 (emphases added). The Court nevertheless concluded that an IEP ought "to confer *some* educational benefit upon the handicapped child"—a standard not met when it provides "*no* benefit." *Id.* at 200-201 (emphases added); *see also id.* at 207.

That is not to say that it is "perfectly fine to aim low." U.S. Br. 19. That an IEP is *substantively* adequate when it is reasonably calculated to provide a benefit does not mean that educators "set out[] to provide educational benefits * * * that are barely more than trivial," *id.* at 18, any more than the Administrative Procedure Act's "arbitrary" and "capricious" standard means that an agency sets out to render decisions that are barely more than rational. 5 U.S.C. § 706(2)(A). Like the Administrative Procedure Act, the IDEA achieves Congress's goals through its *procedures*. And those procedures ensure that educators *do* aim high when they develop an IEP in collaboration with the child's parents. *See, e.g.*, 20 U.S.C. § 1414(d)(1)(A). What the statute does not do is permit courts to second-guess the *substance* of those educational decisions by requiring a "particular outcome" or "level of education." *Rowley*, 458 U.S. at 192.

2. The Government nevertheless argues (at 14) that the IDEA does just that, by requiring courts to ensure that an IEP provides benefits "meaningful in light of the child's potential and the IDEA's stated purposes." There is no basis for that standard in the statute.

The Government tries (at 14) to ground its standard in the "ordinary meaning of 'appropriate.'" But that term was in the IDEA when this Court re-

marked that "[n]oticeably absent from the language of the statute is *any* substantive standard prescribing the level of education to be accorded handicapped children." *Rowley*, 458 U.S. at 189 (emphasis added). And the Court flatly rejected the Government's reliance on the word "appropriate" then, too. *See id.* at 197 n.21. Instead, consistent with the statute's focus on procedures, the Court found that the legislative history of the Act "unmistakably disclose[s]" Congress' understanding that "an 'appropriate education' is provided when personalized educational services are provided." *Id.* at 197; *see* 20 U.S.C. § 1401(9)(D) (defining a FAPE to include "individualized" "special education and related services").

The Government's arguments from the statute's structure and purpose are similarly misplaced. The Government contends (at 15) that "Congress would not have instructed States to develop each child's IEP with such a clear focus on promoting measureable annual progress" if "all it wanted to require was that States provide some degree of educational benefit that is barely more than trivial." But this Court rejected just that kind of reasoning when it found "nothing in the Act to suggest that merely because Congress was rather sketchy in establishing substantive requirements, as opposed to procedural requirements for the preparation of an IEP, it intended that reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself." *Rowley*, 458 U.S. at 206.

The Government mistakenly suggests (at 14-15) that a "literal" reading of the more-than-*de-minimis* standard would allow a school to offer assistive technology to a hearing-impaired child in just one

class, so long as the child made progress in that class. To the extent the Government's hypothetical posits an IEP that arbitrarily fails to provide for services a child needs in order to participate in some portion of the curriculum, it would violate the Americans with Disabilities Act, which requires that recipients of federal funds provide disabled students with an opportunity equal to that of non-disabled students to participate in and benefit from educational programs. 34 C.F.R. § 104.4(b)(1)(ii); *id.* § 104.4(b)(2); *see* 42 U.S.C. § 12102(1), (2)(a); *id.* § 12132. A court confronting such an IEP would thus not need to reach the question here.

3. After advancing a position incompatible with *Rowley*, the Government contends (at 17) that it is the Tenth Circuit's standard that conflicts with that decision by failing to require "any consideration of how" a more than *de minimis* "benefit compares to the child's capabilities and potential." Once again, that misunderstands the IDEA's requirements. An IEP's substantive adequacy is always gauged in relation to *individualized* goals based on an *individualized* assessment of a student's needs. The question answered by the Tenth Circuit was not whether the IDEA entitles a child to an education tailored to her needs—it clearly does. *See, e.g.*, 20 U.S.C. § 1414(d)(3) (mandating consideration of "the academic, developmental, and functional needs of the child" in formulating an IEP). The question is whether a State has satisfied its substantive obligations if the IEP it offers provides a child more than a *de minimis* educational benefit. Under *Rowley* the answer is yes: "[I]f personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, * * * the

child is receiving a 'free appropriate public education' as defined by the Act." 458 U.S. at 189.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

NEAL KUMAR KATYAL
Counsel of Record
FREDERICK LIU
EUGENE A. SOKOLOFF
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

W. STUART STULLER
CAPLAN AND EARNEST LLC
1800 BROADWAY, SUITE 200
BOULDER, CO 80302

DANIEL D. DOMENICO
KITTREDGE LLC
3145 TEJON STREET, #D
DENVER, CO 80211

Counsel for Respondent

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In the Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F., PETITIONER

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
VANITA GUPTA
Principal Deputy Assistant Attorney General
IRVING L. GORNSTEIN
Counselor to the Solicitor General
ROMAN MARTINEZ
Assistant to the Solicitor General
SHARON M. MCGOWAN
JENNIFER LEVIN EICHHORN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

JAMES COLE, JR.
General Counsel
FRANCISCO LOPEZ
ERIC MOLL
Attorneys
U.S. Department of Education
Washington, D.C. 20202

QUESTION PRESENTED

The Individuals with Disabilities Education Act provides federal funds to States that agree to make available a "free appropriate public education" (FAPE) to every eligible child with a disability. 20 U.S.C. 1401(9), 1412(a)(1)(A). The question presented is whether the "educational benefit" provided by a school district must be "merely * * * more than *de minimis*" in order to satisfy the FAPE requirement. Pet. App. 16a (citations and internal quotation marks omitted).

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38th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, 2016, http://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/index.html#download 35

Webster's Third New International Dictionary (1993) 17, 29

In the Supreme Court of the United States

No. 15-827

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F., PETITIONER

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE UNITED STATES

This case involves the core requirement of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, that States receiving special-education grants from the federal government make available a "free appropriate public education" to eligible children with disabilities. 20 U.S.C. 1401(9), 1412(a)(1)(A). The United States has a substantial interest in ensuring that IDEA funds are spent in a manner consistent with that statute. In addition, the Department of Education is responsible for administering the IDEA and has promulgated regulations and policy guidance regarding its implementation. 20 U.S.C. 1406(a) and (d)-(f), 1417(a)(1); see 34 C.F.R. Pt. 300. At this Court's invitation, the United States

filed a brief at the petition stage urging the Court to grant certiorari and vacate the decision below.

STATEMENT

This case requires the Court to determine the degree of educational benefit that States must provide to eligible children with disabilities under the IDEA. The court of appeals held that the IDEA is satisfied so long as schools offer such children educational benefits that are "merely * * * more than *de minimis*." Pet. App. 16a (citations and internal quotation marks omitted). Applying that standard, the court rejected petitioner's claim that respondent had deprived him of his rights under the IDEA. *Id.* at 25a-26a, 36a, 49a, 51a.

1. The IDEA (formerly known as the Education of the Handicapped Act) provides federal grants to States "to assist them to provide special education and related services to children with disabilities." 20 U.S.C. 1411(a)(1). The statute's stated purpose is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. 1400(d)(1)(A).

The IDEA achieves that purpose by establishing an "enforceable substantive right to public education." *Honig* v. *Doe*, 484 U.S. 305, 310 (1988); see *Smith* v. *Robinson*, 468 U.S. 992, 1010 (1984). Specifically, the IDEA requires States receiving IDEA funds to make a "free appropriate public education" (FAPE) available to every eligible child with a disability residing in the State. 20 U.S.C. 1412(a)(1)(A). The FAPE requirement embodies Congress's "ambitious objective"

of promoting educational opportunities for such children. *School Comm. of Burlington* v. *Department of Educ.*, 471 U.S. 359, 368 (1985) (*Burlington*). The proper interpretation of that requirement is the subject of the question presented in this case.

a. The IDEA defines FAPE to mean "special education and related services" that

> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under section 1414(d) of [Title 20 of the United States Code].

20 U.S.C. 1401(9).

The IDEA defines the "special education" component of the FAPE requirement as "specially designed instruction * * * to meet the unique needs of a child with a disability." 20 U.S.C. 1401(29). The Department of Education has promulgated regulations defining "specially designed instruction" to mean "adapting" educational methods to "address the unique needs of the child that result from the child's disability" and to help the child "meet the educational standards * * * that apply to all children." 34 C.F.R. 300.39(b)(3) (emphasis omitted).

The "individualized education program" (IEP) referenced in Subsection (D) of the FAPE definition is

the "centerpiece" of the IDEA's scheme for providing children with disabilities with a FAPE. *Honig*, 484 U.S. at 311; see 20 U.S.C. 1401(9)(D). An IEP must comply with specific statutory requirements and establish a special education program tailored to each child's "unique needs." 20 U.S.C. 1401(29); see 20 U.S.C. 1401(9)(D), 1414(d)(1)(A); 34 C.F.R. 300.22, 300.34, 300.39, and 300.320.

In *Board of Education of the Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176 (1982) (*Rowley*), this Court held that an IEP must be "reasonably calculated to enable the child to receive educational benefits." *Id.* at 207. Although the Court declined "to establish any one test" for assessing the "adequacy" of such benefits, it made clear that the FAPE requirement obligates States to provide each eligible child with "access" to education that is "*meaningful.*" *Id.* at 192, 200, 202 (emphasis added).

b. The IDEA requires school districts to work collaboratively with parents to formulate the IEP for each child with a disability.[1] But Congress anticipated that this process would not always produce a consensus, and it established procedures by which parents can seek administrative and judicial review of a school district's IDEA-related determinations. See 20 U.S.C. 1415(f)-(j); *Burlington*, 471 U.S. at 368-369.

If parents are unable to resolve a dispute with their school district, they may obtain "an impartial due process hearing" before a state or local educational agency. 20 U.S.C. 1415(f)(1)(A) and (B); see 20 U.S.C. 1415(b)(6) and (7). The losing party may then seek

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[1] See, *e.g.*, 20 U.S.C. 1400(d)(1)(B), 1414(b)(2)(A), (d)(1)(B)(i), (d)(3)(A)(ii), (d)(3)(D), (d)(4)(A)(ii)(III), and (e), 1415(b)(1), (3)-(5), and (f)(3)(E)(ii)(II).

judicial review of a final administrative decision in either state or federal district court. 20 U.S.C. 1415(i)(2)(A). In adjudicating the case, the court must give "due weight" to the result of the state administrative proceedings. *Rowley*, 458 U.S. at 206.

2. Petitioner Endrew F. is a child with attention-deficit/hyperactivity disorder and autism. Pet. App. 3a. Petitioner's autism "affects his cognitive functioning, language and reading skills, and his social and adaptive abilities," including his ability to communicate his needs and emotions. *Ibid.*; see *id.* at 28a. As a child with autism, petitioner is eligible for a special education program under the IDEA. 20 U.S.C. 1401(3); Br. in Opp. 1; Pet. 6.

Petitioner attended public school in respondent Douglas County School District from preschool through fourth grade. Pet. App. 3a-4a. Pursuant to the IDEA, he received a special education program through an IEP for each school year. *Id.* at 4a. In May 2010, petitioner's parents withdrew him from the public school system following a dispute with respondent over the content of his fifth-grade IEP. *Id.* at 3a-4a, 15a; Br. in Opp. 2. Petitioner's parents enrolled petitioner in a private school, where he has made "academic, social and behavioral progress." Pet. App. 29a.

In 2012, petitioner filed a due-process IDEA complaint with the Colorado Department of Education. Pet. App. 59a. The complaint asserted that respondent had denied him a FAPE within the public school system. *Id.* at 4a, 60a. Petitioner sought reimbursement for his private-school tuition. *Id.* at 4a; see 20 U.S.C. 1412(a)(10)(C)(ii) (authorizing reimbursement as remedy for FAPE violation); *Burlington*, 471 U.S.

at 369. A Colorado hearing officer conducted a three-day hearing and ruled in respondent's favor, concluding that petitioner had "made some academic progress" while enrolled in respondent's public school system. Pet. App. 84a-85a; see *id.* at 59a-85a.

3. Petitioner sued respondent under the IDEA in federal district court, claiming that respondent had denied him a FAPE. Pet. App. 4a. That court upheld the hearing officer's decision. *Id.* at 27a-58a. The court held that the IDEA requires States to provide only "some educational benefit." *Id.* at 36a. Based on evidence that petitioner had made "at the least, minimal progress" in public school, *id.* at 49a, the court concluded that petitioner had received all the Act requires, *id.* at 51a.

4. The Tenth Circuit affirmed. Pet. App. 1a-26a. It interpreted *Rowley* to hold that the IDEA requires States to provide "some educational benefit" that "must *merely be more than de minimis.*" *Id.* at 16a (emphasis added; citations and internal quotation marks omitted). The court concluded that respondent's IEP for petitioner was adequate under that minimal standard. *Id.* at 23a. The court acknowledged, however, that even under the "merely * * * more than *de minimis*" test, "[t]his is without question a close case." *Id.* at 17a, 23a.

SUMMARY OF ARGUMENT

The Tenth Circuit rejected petitioner's claim based on its view that States can comply with the IDEA by providing educational benefits that are "merely * * * more than *de minimis.*" Pet. App. 16a (citations and internal quotation marks omitted). That holding is wrong. The IDEA requires States to give eligible children with disabilities an opportunity to make sig-

nificant educational progress, taking account of the child's unique circumstances. This Court should vacate the decision below and remand the case for application of the correct standard.

A. This Court first interpreted the FAPE requirement in *Board of Education of the Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176 (1982). There, the Court recognized that the IDEA guarantees children with disabilities an enforceable, substantive right to an appropriate education. *Id.* at 200-204, 206-207. The Court declined to establish a bright-line test defining the content of the substantive FAPE requirement. *Id.* at 202. But it did explain that States must provide each eligible child with "meaningful" access to education. *Id.* at 192.

Rowley's "meaningful" access requirement is most sensibly understood to obligate States to offer each eligible child an opportunity to make significant educational progress, in light of his particular needs and capabilities. 458 U.S. at 192. Without the opportunity to make such progress, access to education cannot be "meaningful" under any reasonable understanding of that term. That conclusion is strongly reinforced by *Rowley*'s statement that a child in the general education classroom must receive an IEP that is "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.* at 204.

B. A requirement of significant educational progress is also the standard that is most consistent with the text, structure, and purpose of the IDEA. As a textual matter, Congress obligated participating States to provide eligible children an education that is "*appropriate.*" 20 U.S.C. 1412(a)(1)(A) (emphasis added). The IDEA's IEP provisions expressly require

schools to assess each child's capabilities, identify ambitious goals, develop a detailed plan to achieve those goals, and use measurement tools to assess progress along the way. See 20 U.S.C. 1414(d). Those elaborate procedures make sense only if Congress envisioned an "appropriate" education as one giving such children an opportunity to make significant educational progress.

The IDEA's stated purposes confirm that conclusion. Congress was explicit that the IDEA would set "high expectations" for children with disabilities and "prepare" them "for further education, employment, and independent living." 20 U.S.C. 1400(c)(5)(A) and (d)(1)(A). Those goals would not be attainable unless a child is entitled to an opportunity for significant educational progress. Congress's sustained legislative engagement with respect to the IDEA over the past two decades, with its increased emphasis on educational achievement, provides further support for a robust significant educational opportunity standard. So do the Department of Education's regulations and guidance, which require schools to give all children with disabilities the opportunity to make appropriate progress toward mastering the knowledge and skills addressed in the same general curriculum taught to other children.

C. The significant progress standard is entirely workable. Schools can satisfy the FAPE requirement by assessing each child's needs and capabilities on an individualized basis, and then making reasonable educational judgments about the educational services that will help the child make significant progress toward attaining the goals identified by Congress. The significant educational progress standard is not a

license for courts to micromanage the reasonable judgments of educators or State hearing officers.

D. Whatever else the Court says about the substantive content of the FAPE requirement, it should reject the Tenth Circuit's "merely * * * more than *de minimis*" test. That test conflicts with the IDEA's mandate that States provide an education that is "appropriate." 20 U.S.C. 1412(a)(1)(A). No reasonable parent or teacher would think a child has received an "appropriate" education simply because he has received some benefit—however small—that is just barely more than trivial.

The Tenth Circuit's standard is also at odds with the IDEA's structure and purpose. Requiring only non-trivial progress is not consistent with the robust IEP-development process mandated by Congress. Nor does it square with Congress's stated goals. It is hard to imagine a legal standard that more directly contradicts Congress's purpose of embracing "high expectations"—and rejecting "low expectations"—than one that requires schools to provide educational benefits that are "merely * * * more than *de minimis*." 20 U.S.C. 1400(c)(4) and (5)(A).

ARGUMENT

THE IDEA REQUIRES STATES TO ENSURE THAT ELIGIBLE CHILDREN WITH DISABILITIES HAVE THE OPPORTUNITY TO MAKE SIGNIFICANT EDUCATIONAL PROGRESS

This Court's decision in *Board of Education of the Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176 (1982), is best read as establishing that the IDEA requires States to give eligible children with disabilities the opportunity to make significant educational progress in light of a child's capabilities

and potential. The text, structure, purpose, and history of the IDEA all support that interpretation.

The significant educational progress standard is ambitious, but realistic. For students who are fully integrated into the regular classroom, that standard generally requires school districts to offer eligible students an opportunity to master grade-level content. For other students, that standard requires schools to enable eligible children to make progress that is appropriate in light of their own particular needs and capabilities. But the core requirement of significant educational progress remains. Because the lower courts applied the wrong legal standard, this Court should vacate the decision below and remand the case for further proceedings.[2]

A. *Rowley*'s Holding That Access To Education Must Be "Meaningful" Requires An Opportunity For Children To Make Significant Educational Progress

In *Rowley*, this Court addressed whether—and to what extent—the IDEA provides children with disabilities an enforceable substantive right to a FAPE. The Court chose not to define the precise contours of that right. 458 U.S. at 202. Nonetheless, the Court made clear that the IDEA obligates States to provide eligible children with substantive educational benefits that are sufficient to make their "access" to education "meaningful." *Id.* at 192. Taken as a whole, *Rowley* is most sensibly understood to require States to provide

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[2] This brief uses the term "significant educational progress" to refer not only to a child's academic progress, but also to progress with respect to aspects of the child's functional development (behavioral, physical, emotional, etc.) that are—or should be—addressed in his IEP. See, *e.g.*, 20 U.S.C. 1400(c)(5), 1401(26)(a) and (34), 1414(d)(1)(A)(i)(I), (II), (VIII), and (3)(A)(iv).

children with the opportunity to make significant educational progress, in light of each child's unique circumstances.

1. The plaintiff in *Rowley* was a girl with a hearing impairment, Amy Rowley, whose parents wanted her school to provide "a qualified sign-language interpreter in all her academic classes." 458 U.S. at 184. Amy's IEP instead gave her other accommodations, including use of an FM hearing aid and eight hours of instruction each week from a tutor and speech therapist. *Ibid.* Amy was an "excellent" lipreader, and she thrived in elementary school even without the interpreter's assistance. *Ibid.* In particular, Amy was "remarkably well-adjusted"; she was able to "interact[] and communicate[] well with her classmates; she developed "an extraordinary rapport" with her teachers; and she was "achieving educationally, academically, and socially." *Id.* at 185 (citations omitted) (summarizing district court findings). Most notably, Amy "perform[ed] better than the average child in her class" and was "advancing easily from grade to grade." *Id.* at 185, 210 (citations omitted).

Amy sued her school district under the IDEA, alleging that the school's refusal to provide the sign-language interpreter denied her a FAPE. The district court ruled in her favor, holding that the FAPE requirement imposes a substantive obligation on States to provide each eligible child with "an opportunity to achieve [his or her] full potential commensurate with the opportunity provided to other children." *Rowley*, 458 U.S. at 185-186 (citation omitted). The Second Circuit affirmed that interpretation of the FAPE standard, and Amy defended it in this Court. *Ibid.*; see generally *id.* at 187-204 & n.26; U.S. Amicus Br. at

12-23, *Rowley*, *supra* (No. 80-1002) (largely endorsing district court's analysis).

The school district's primary argument for reversal was that the IDEA "did not create substantive individual rights to free appropriate public education," and that the FAPE requirement was merely an aspirational "goal." Pet. Br. at 28, 41, *Rowley*, *supra* (No. 80-1002). The district further argued that federal jurisdiction in IDEA cases is limited to assessing whether a school district has complied with the IDEA's procedural requirements. *Id.* at 33, 51.

2. The *Rowley* Court ultimately concluded that the school district had not violated the IDEA—and that Amy had obtained a FAPE—because Amy was receiving "substantial specialized instruction and related services," "performing above average in the regular classrooms" of her school, and "advancing easily from grade to grade." 458 U.S. at 202, 210 (citation omitted). In doing so, however, the Court rejected both parties' interpretations of the FAPE requirement.

Most fundamentally, the Court rejected the school district's argument that the IDEA does not create any individual, substantive right to a FAPE that is enforceable in court. *Rowley*, 458 U.S. at 200-204, 206-207. As the Court explained, courts analyzing an alleged FAPE violation must conduct a "twofold" inquiry. *Id.* at 206. "First," they must determine whether the State has "complied with the procedures" set forth in the IDEA. *Ibid.* "And second," courts must determine whether the child's IEP is "reasonably calculated to enable the child to receive educational benefits." *Id.* at 206-207. The Court made clear

that the IDEA is satisfied only if *both* requirements—procedural *and* substantive—are met. *Id.* at 207.[3]

3. As to the content of the IDEA's substantive requirement, the *Rowley* Court acknowledged that the statutory text does not explicitly set forth "any substantive standard prescribing the level of education to be accorded handicapped children." 458 U.S. at 189. But the Court also concluded that "[i]mplicit in the congressional purpose of providing access to a [FAPE] is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Id.* at 200. The Court therefore held that the IDEA provides a "basic floor of opportunity" that requires States to provide access to special education and related services "which are individually designed to provide educational benefit to the handicapped child." *Id.* at 201.

The Court ultimately stated that it would not "attempt today to establish any one test for determining the [substantive] adequacy of educational benefits conferred upon all children by the Act." *Rowley*, 458 U.S. at 202. Nonetheless, the Court laid down three important markers that shed light on the content and application of the substantive FAPE standard.

First, the Court rejected Amy's argument that States must provide educational benefits sufficient to "maximize the potential of each handicapped child commensurate with the opportunity provided non-

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[3] This Court has since repeatedly cited *Rowley* for the proposition that the IDEA grants an "enforceable substantive right to public education" to eligible children with disabilities. *Honig* v. *Doe*, 484 U.S. 305, 310 (1988); see *Winkelman* v. *Parma City Sch. Dist.*, 550 U.S. 516, 531-532 (2007); *Smith* v. *Robinson*, 468 U.S. 992, 1010 (1984).

handicapped children." *Rowley*, 458 U.S. at 200; see *id.* at 197 n.21. It explained that Congress did not intend to achieve such "strict equality of opportunity or services," and it described the standard embraced by the lower courts as "unworkable" insofar as it required "impossible measurements and comparisons" between different children with different needs and abilities. *Id.* at 198.

Second, the Court made clear that the "substantive educational standard" embodied in the FAPE requirement ensures that each eligible child's "access" to public education is "*meaningful.*" *Rowley*, 458 U.S. at 192 (emphasis added); see *Cedar Rapids Cmty. Sch. Dist.* v. *Garret F.*, 526 U.S. 66, 73 (1999) (emphasizing *Rowley*'s "meaningful" access requirement); *Irving Indep. Sch. Dist.* v. *Tatro*, 468 U.S. 883, 891 (1984) (same). The Court later elaborated on that standard, noting that "if the child is being educated in the regular classrooms of the public school system," the child's IEP "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Rowley*, 458 U.S. at 204.

Third, the Court indicated that compliance with the FAPE requirement as to any individual child turns on a case-specific analysis of that child's unique needs and capabilities. The Court emphasized the "infinite variations" in the capabilities of different children with different disabilities, and it noted that "the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end." *Rowley*, 458 U.S. at 202.

4. *Rowley*'s recognition that States must provide "meaningful" access to education is sensibly interpreted to require them to give eligible children the

opportunity to make significant educational progress. After all, *access to* education is only a means to obtaining the *benefits of* education. Access will only be meaningful if the benefit that results from that access is also meaningful.

In addition, standard dictionaries establish that "meaningful" and "significant" are synonyms.[4] When they are used to modify a phrase such as "access to public education," *Rowley*, 458 U.S. at 192, both adjectives make clear that the quality and degree of such access must be sufficient to allow the child to make important educational gains. *Rowley*'s statement that the IDEA requires "meaningful" access to education is thus best read as another way of saying that States must give children the opportunity to make significant educational progress.

That interpretation of *Rowley* is further supported by the Court's separate observation that the IEP for a child who is educated "in the regular classrooms of the public school system" should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." 458 U.S. at 204.[5] That observation both confirms that the IDEA generally requires significant educational progress, and pro-

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[4] See, *e.g.*, *Merriam-Webster's Collegiate Dictionary* 769 (11th ed. 2003) (defining "meaningful" as "significant") (capitalization altered); 9 *The Oxford English Dictionary* 522 (2d ed. 1989) ("[f]ull of meaning" or "significant"); *Random House Webster's Unabridged Dictionary* 1191 (2d ed. 1998) ("full of meaning, significance, purpose, or value"); see also *The New Oxford American Dictionary* 1052 (2d ed. 2005) ("having a serious, important, or useful quality or purpose").

[5] The Court emphasized that the mere fact that a child advances from grade to grade does not necessarily establish that he has received a FAPE. *Rowley*, 458 U.S. at 203 n.25.

vides more concrete guidance on what that standard entails for eligible students who have the capacity to master grade-level content.

While *Rowley* does not provide comparable concrete guidance on what the IDEA requires for students who cannot be fully integrated into the general education classroom, it nonetheless makes clear that significant progress is also required for those children. Such children are subject to the same FAPE requirement, and they are therefore also entitled to "meaningful"—*i.e.*, significant—educational progress. The educational programs that these children receive will of course vary based on their particular disabilities and capabilities. Some children may be so far behind grade level in certain academic areas that significant educational progress will entail mastering the skills that are a necessary prerequisite for grade-level instruction. Others may have disabilities that are so severe that significant educational progress will entail specialized services geared toward learning more basic skills. See pp. 26-27, *infra* (providing examples). In all circumstances, however, *Rowley* requires States to implement an IEP that is reasonably calculated to enable the child to make progress that is significant in light of his own unique circumstances.

B. The IDEA Itself Confirms That States Must Offer Eligible Students The Opportunity To Make Significant Educational Progress

Even apart from *Rowley*, the text, structure, purpose, and history of the IDEA establish that States must give eligible children the opportunity to make significant educational progress.

1. The core textual command of the IDEA's FAPE requirement is that States make available to eligible

children a public education that is "*appropriate*." 20 U.S.C. 1412(a)(1)(A) (requiring States to provide a "free *appropriate* public education") (emphasis added); see 20 U.S.C. 1401(9)(C) (defining FAPE to require "an appropriate preschool, elementary school, or secondary school education in the State involved"). Standard dictionaries define "appropriate" to mean "specially suitable," "fit," or "proper," *Webster's Third New International Dictionary* 106 (1993) (*Webster's Third*) (capitalization altered), or "suitable or proper in the circumstances," *The New Oxford American Dictionary* 76 (2d ed. 2005) (*New Oxford*).

This Court has explained that "appropriate" is "the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors." *Michigan* v. *EPA*, 135 S. Ct. 2699, 2707 (2015) (citation omitted). Precisely which factors are relevant turns on the particular statutory context in which that term arises. See *School Comm. of Burlington* v. *Department of Educ.*, 471 U.S. 359, 369 (1985) (holding that what constitutes "appropriate" relief in IDEA district court action must be determined "in light of the purpose of the [IDEA]"); see also, *e.g.*, *Sossamon* v. *Texas*, 563 U.S. 277, 286-287 (2011) (looking to statutory context and purpose to determine what relief is "appropriate" under 42 U.S.C. 2000cc-2(a)); *West* v. *Gibson*, 527 U.S. 212, 217-218 (1999) (holding that the meaning of "appropriate" depends on statutory context). Here, the text, purpose, and history of the IDEA establish that an education is "appropriate" when it provides the child with an opportunity to make significant progress in light of his capabilities.

2. The IDEA provisions describing the IEP development process envision that schools will offer children with disabilities the opportunity to make significant progress. See 20 U.S.C. 1414(d). Section 1414(d)(1)(A)(i)(I) first requires schools to assess "the child's present levels of academic achievement and functional performance," including "how the child's disability affects the child's involvement and progress in the general education curriculum." See 20 U.S.C. 1414(d)(3)(A). Section 1414(d)(1)(A)(i)(II) then requires schools to develop a clear statement of "measurable annual goals"—"including academic and functional goals"—in light of the child's needs and abilities. Those goals must be designed both (1) to "meet the child's needs that result from the child's disability to enable the child to * * * make progress in the general education curriculum," and (2) to "meet each of the child's other educational needs that result from the child's disability." 20 U.S.C. 1414(d)(1)(A)(i)(II).

The annual IEP goals are not merely hortatory: Schools must both describe how they will measure "the child's progress toward meeting" those academic and functional goals and establish a mechanism for providing parents with "periodic reports on th[at] progress." 20 U.S.C. 1414(d)(1)(A)(i)(III). Schools must also set forth, in detail, the way in which they will deliver special education and related services to ensure that the child is able to (1) "advance appropriately toward attaining the annual goals," (2) "be involved in and make progress in the general education curriculum," (3) "participate in extracurricular and other nonacademic activities," and (4) "be educated and participate with other children with disabilities and nondisabled children" in the activities described

in the IEP. 20 U.S.C. 1414(d)(1)(A)(i)(IV). And when a child exhibits a "lack of expected progress toward the annual goals and in the general curriculum," the IDEA requires schools to revise the IEP "as appropriate" to address the deficiency. 20 U.S.C. 1414(d)(4)(A)(ii).

Section 1414(d)'s IEP provisions provide clear insight into what level of education Congress has deemed "appropriate" for purposes of the FAPE requirement. See 20 U.S.C. 1401(9)(D) (requiring a FAPE to be "provided in conformity with the [IEP] required under [S]ection 1414(d)"). Congress would not have established procedures that are so elaborate and robust unless it intended to guarantee eligible children an opportunity to make significant educational progress in light of their respective capabilities.

3. Congress's stated purposes also support a significant educational progress standard. See *Forest Grove Sch. Dist.* v. *T. A.*, 557 U.S. 230, 239-245 (2009) (emphasizing that IDEA must be interpreted in light of its "remedial purpose"); see also *Burlington*, 471 U.S. at 369 (looking to IDEA's "purpose" in determining what constitutes "appropriate" IDEA relief).

Congress expressly stated that the IDEA's "purposes" include "ensur[ing] the effectiveness of[] efforts to educate children with disabilities" and providing such children with a FAPE that will "meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. 1400(d)(1)(A) and (4). It further explained that the IDEA is targeted to "[i]mproving educational results for children with disabilities" and thereby helping to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency" for

such individuals. 20 U.S.C. 1400(c)(1); see 20 U.S.C. 1412(a)(2) (requiring State goals to include "providing full educational opportunity to all children with disabilities"). Congress also emphasized the importance of setting "high expectations"—and avoiding "low expectations"—for children with disabilities. 20 U.S.C. 1400(c)(4) and (5)(A).

Those purposes—all codified in the statutory text—reflect Congress's goal of ensuring that eligible children with disabilities have the opportunity to make significant educational progress at school. Without such progress, those children would be unable to attain further education, employment, or economic self-sufficiency. And denying them the chance to make such progress would undermine the goal of equal opportunity and ratify the "low expectations" that Congress unambiguously rejected. 20 U.S.C. 1400(c)(4).

4. Interpreting the IDEA to require an opportunity for significant educational progress is also consistent with Congress's repeated engagement with the IDEA over the past two decades. In 1982, the *Rowley* Court held that States must provide eligible children with "meaningful" access to education. 458 U.S. at 192. In 1997 and 2004, Congress twice enacted major legislation reauthorizing and modifying the IDEA in ways that reflect Congress's overarching desire to expand the educational rights of children with disabilities. See Individuals with Disabilities Education Improvement Act of 2004 (2004 IDEA Amendments), Pub. L. No. 108-446, 118 Stat. 2647; Individuals with Disabilities Education Act Amendments of 1997 (1997 IDEA Amendments), Pub. L. No. 105-17, 111 Stat. 37; see generally Pet. Br. 6-8.

Among other changes, the 1997 and 2004 IDEA Amendments established many of the findings, purposes, and IEP requirements discussed at length above.[6] By those changes, Congress sought "to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education." *Forest Grove*, 557 U.S. at 239. (quoting S. Rep. No. 17, 105th Cong., 1st Sess. 3 (1997)); see S. Rep. No. 185, 108th Cong., 1st Sess. 1-2 (2003) (2003 Senate Report) (noting that purpose of amendments was to "strengthen implementation" of the IDEA, "shift the IDEA from a compliance-driven model to a performance-driven model," and generally "improv[e] the quality of education for children with disabilities"). As Congress itself indicated in both 1997 and 2004, its overriding goal was to replace "low expectations" with "high expectations."[7]

In addition, Congress has also aligned the IDEA with the substantial reform and accountability measures adopted in the Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. 6301 *et seq.*, as amended by the No Child Left Behind Act of 2001 (NCLB), Pub. L. No. 107-110, 15 Stat. 1425, and the Every Student Succeeds Act (2015) (ESSA), Pub. L. No. 114-95, 129 Stat. 1802. Congress amended the

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[6] See 2004 IDEA Amendments, §§ 601(c)(5)(A) and (d)(1)(A), 614(d)(1)(A)(i)(II) and (III), 118 Stat. 2649, 2651, 2708 (revising what is now 20 U.S.C. 1400(c)(5)(A) and (d)(1)(A), 1414(d)(1)(A)(i)(II) and (III)); 1997 IDEA Amendments, §§ 601(c)(1), (d)(1)(A) and (4), 614(d)(1)(A) and (4), 111 Stat. 38, 42, 83, 87 (revising what is now 20 U.S.C. 1400(c)(1), (d)(1)(A), and (4)(A), 1414(d)(1)(A) and (4)(A)); see generally pp. 18-20, *supra*.

[7] 2004 IDEA Amendments, § 601(c)(4) and (5)(A), 118 Stat. 2649; 1997 IDEA Amendments § 601(c)(4) and (5)(A), 111 Stat. 39.

IDEA—in 2004 and again in 2015—to establish "goals for the performance of children with disabilities" that "are the same as the State's long-term goals and measurements of interim progress for children with disabilities" under the ESEA. 20 U.S.C. 1412(a)(15)(A)(ii); see 20 U.S.C. 1412(a)(15)(B) (requiring States to "establish[] performance indicators" to assess such progress).

Congress's decision to link the IDEA to the ESEA is significant because the ESEA requires States to adopt "challenging academic content standards and aligned academic achievement standards" for *all* students in public schools—including children with disabilities. 20 U.S.C. 6311(b)(1); see 34 C.F.R. 200.1(a)-(c); see also 20 U.S.C. 6311(b)(1)(D)(i) (requiring those standards to be "aligned with the entrance requirements" for State's public colleges and universities). Separate standards can apply to children classified as having the most significant cognitive disabilities under certain circumstances, but only insofar as they "reflect professional judgment as to the highest possible standards achievable" by those children. 20 U.S.C. 6311(b)(1)(E)(i)(III); 34 C.F.R. 200.1(d).

The ESEA also requires States to carry out regular assessments measuring student progress under the applicable standards, and to establish "ambitious * * * long-term goals" for "improved * * * academic achievement" and high-school graduation rates. 20 U.S.C. 6311(b)(2) and (c)(4)(A). By linking the IDEA to the ESEA's accountability measures, Congress established a "unified system of accountability" to promote its purpose of "ensur[ing] that all children"—"including children with disabilities"—"are held to

high academic achievement standards." 2003 Senate Report 17-18.

Congress's repeated amendments to the IDEA in recent decades shed light on what counts as an "appropriate" education for purposes of the FAPE requirement. See *West*, 527 U.S. at 217-218 (holding that meaning of "appropriate" in 42 U.S.C. 2000e-16(b) is not "fr[o]ze[n]" in time and is properly informed by subsequent statutory amendments). At every step, Congress has reaffirmed and deepened its commitment to enhancing the substantive educational benefits available to children with disabilities. The IDEA's historical evolution thus confirms that an "appropriate" education is one that is reasonably calculated to allow a child with a disability to make significant educational progress.

5. Finally, requiring significant educational progress also comports with the Department of Education regulations implementing the IDEA. See *Rowley*, 458 U.S. at 186 n.8 (indicating that IDEA regulations are relevant source of "guidance" with respect to the FAPE requirement). Because the Department of Education is charged with enforcing the IDEA, its regulations are entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See 20 U.S.C. 1406 (authorizing such regulations).

As noted above, the IDEA defines FAPE to include "special education," which includes "*specially designed instruction* * * * to meet the unique needs of a child with a disability." 20 U.S.C. 1401(29) (emphasis added). The Department of Education regulations define "specially designed instruction" to mean "adapting, as appropriate to the needs of an eligible child * * * , the content, methodology, or delivery of

instruction" so as "(i) [t]o address the unique needs of the child that result from the child's disability," and "(ii) [t]o ensure access of the child to the general curriculum, *so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.*" 34 C.F.R. 300.39(b)(3) (emphasis added).

Consistent with that regulation, the Department of Education has explained that it expects IEP goals to be "aligned with grade-level [academic] content standards for all children with disabilities." U.S. Dep't of Educ., Dear Colleague Letter 1 (Nov. 16, 2015), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf. At the same time, the Department has emphasized that such alignment does not replace the individualized decisionmaking required in the IEP process. *Id.* at 4. A school must therefore determine—on an "individualized" basis—how much progress toward grade-level standards a particular child can reasonably be expected to make each year, considering (among other factors) (1) the impact of the child's "specific disability," (2) the "special education instruction that has been provided to the child," (3) the child's "previous rate of academic growth," and (4) "whether the child is on track to achieve grade-level proficiency within the year." *Ibid.*

Ultimately, the Department has declared that "an IEP team should determine annual goals that are *ambitious* but *achievable*." Dear Colleague Letter 5 (emphasis added). That interpretation of the FAPE requirement tracks Congress's intent and supports the significant educational progress standard.

C. A Significant Educational Progress Standard Is Workable And Respects The Reasonable Judgment Of Schools And Hearing Officers

The IDEA's significant educational progress standard is readily administrable, and it pays due regard to the judgments of educational experts.

1. Requiring States to provide children with an opportunity to make significant educational progress does not impose a rigid, one-size-fits-all test that unduly restrains the discretion of educators. On the contrary, the standard is flexible and individualized, and it promotes the sort of commonsense educational judgments that schools and teachers generally make—with respect to all of their students—every day.

As explained above, the IDEA's robust procedural provisions require schools designing an IEP to meet with the child's parents, consider the child's unique needs and capabilities, determine what special education and related services will help the child learn, develop appropriate goals, and measure progress. See pp. 4, 18-19, *supra*. The significant educational progress standard protects children with disabilities by ensuring that the IEP development process is not an empty formality, but rather produces an educational plan that will actually advance Congress's goal of meaningfully enhancing the lives and opportunities of such children.

Schools must ultimately ensure that each child's IEP is tailored to his needs and reasonably calculated to provide him with an opportunity to make significant progress. The degree of progress that is required in each instance must reflect both (1) a fair assessment of the child's capabilities and potential, and (2) the

IDEA's overarching goals of preparing children with disabilities for "further education, employment, and independent living." 20 U.S.C. 1400(d)(1)(A).

Notably, the significant educational progress standard does not require States to "maximize each child's potential" or "achieve strict equality of opportunity or services." *Rowley*, 458 U.S. at 198 (rejecting these goals). But it does promote "high expectations" for children with disabilities—and it avoids "low expectations"—just as Congress intended. 20 U.S.C. 1400(c)(4) and (5)(A).

2. The straightforward and commonsense approach described above will undoubtedly result in different IEPs for different children with different capabilities. See *Rowley*, 458 U.S. at 202 (noting "infinite variations" in the educational benefits obtainable by such children). For example, a child with impaired vision may require special instruction in Braille, along with appropriately modified classroom materials, in order for her to be educated in the general education classroom and participate fully in the general education curriculum. See 20 U.S.C. 1414(d)(3)(B)(iii). For that child, significant educational progress might mean that she is able to attain the same degree of learning and academic achievement that is typical of her non-disabled classmates, such that she will "achieve passing marks," "advance from grade to grade," and eventually be in a position to pursue higher education. *Rowley*, 458 U.S. at 204.

Significant educational progress could mean something different, however, for a child whose learning disability leads him to read at four grade levels below his class peers. In that circumstance, the IEP team might reasonably conclude that an appropriate goal is

to close the reading gap by two levels through specialized reading instruction, while permitting the child to access some curricular content through a combination of audio text books and other electronic resources. Dear Colleague Letter 4-5 (offering similar example). That child could thereby receive a FAPE, even if the significant progress that he makes in reading still leaves him two levels behind his classmates at the end of the year.

Finally, a child with significant cognitive and other disabilities may need to receive much of his instruction outside of the general education classroom. Depending on the circumstances, significant progress for that student might encompass mastery of basic life skills—such as self-care, socialization, basic reading, and functional math (for example, counting money and telling time)—that could eventually enable the child to work and live independently.

In each of those cases, the hypothesized IEP reflects a reasonable determination—made by educators—of the degree of progress that the particular child can make in light of his particular disability and capability. In each case, that progress helps the child to master knowledge and develop essential skills, thereby advancing the underlying purposes of the IDEA. See 20 U.S.C. 1400(d)(1)(A) (noting Congress's goals of meeting "unique needs" of eligible children and preparing them for "further education, employment, and independent living").

3. The IDEA ensures that schools have the primary responsibility for consulting with parents and determining the degree of "ambitious but achievable" progress that is appropriate for each child with a disability. Dear Colleague Letter 5; see generally

pp. 3-4, 18-19, *supra*. In most cases, schools and parents will reach consensus on an IEP that is reasonably calculated to help the child learn and succeed. When schools and parents disagree, State hearing officers can adjudicate disputes and ensure that the IEP in fact provides the child with the opportunity to make significant progress. See pp. 4-5, *supra*.

In the relatively small number of IDEA cases that result in litigation, courts must grant "due weight" to the child-specific determinations made by hearing officers, *Rowley*, 458 U.S. at 206, and they should also respectfully consider the on-the-ground judgments of teachers and school administrators, see generally 20 U.S.C. 1414(d)(1)(B). The purpose of judicial review is not to have courts "impos[e] their view of preferable educational methods upon the States." *Rowley*, 458 U.S. at 207. Rather, its purpose is to ensure that the State decisionmakers have exercised reasonable educational judgment in concluding that a particular IEP will enable significant educational progress for the particular child at issue. Both the substantive FAPE standard and the standard of review respect the expertise of State educational officials, while also protecting the educational rights of children with disabilities.

D. The Tenth Circuit's "Merely * * * More Than *De Minimis*" Standard Is Erroneous

For the reasons explained above, the IDEA's FAPE requirement obligates States to give children with disabilities the opportunity to make significant educational progress. But even if the Court disagrees with that articulation of the substantive standard, one thing should be clear: The Tenth Circuit's "merely * * * more than *de minimis*" rule is wrong. Pet.

App. 16a (citations and internal quotation marks omitted). That standard is not consistent with the IDEA's text or purpose, and it harms children with disabilities by saddling them with low expectations in their most formative years. Whatever else the Court says about FAPE, it should hold that barely-more-than-trivial progress is not sufficient.

1. a. The Tenth Circuit's standard does not square with the IDEA's requirement that the education provided be "appropriate." 20 U.S.C. 1401(9)(C), 1412(a)(1)(A). As noted above, the ordinary meaning of "appropriate" is "specially suitable," "fit," or "proper," *Webster's Third* 106 (capitalization altered), or "suitable or proper in the circumstances," *New Oxford* 76.

The "merely * * * more than *de minimis*" test is incompatible with that ordinary meaning. No parent or educator in America would say that a child has received an "appropriate" or a "specially suitable" or "proper" education "in the circumstances" when all the child has received are benefits that are barely more than trivial. That is especially true when a child is capable of achieving much more.[8]

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[8] Respondent is wrong to argue (Supp. Br. in Opp. 10) that giving any substantive content to the word "appropriate" violates *Rowley*. To be sure, *Rowley* rejected the argument that the term "appropriate" is a "term of art which concisely expresses" the "potential-maximizing" interpretation embraced by the lower courts in that case. 458 U.S. at 197 n.21. But the Court expressly recognized that "appropriate" has both substantive *and* procedural components. *Ibid.* ("Congress used the word ["appropriate"] as much to describe the settings in which handicapped children should be educated *as to prescribe the substantive content* or supportive services of their education.") (emphasis added); see generally *id.* at 206-207 (requiring "twofold" substantive/

b. Three examples illustrate how the Tenth Circuit's "merely * * * more than de *minimis*" test violates the textual requirement that States provide an "appropriate" education.

First, consider a fourth-grader with cognitive disabilities who receives specialized educational programming for the first two months of the school year, during which she makes excellent progress. The school then cuts off the specialized services entirely, and she makes no additional progress for the remainder of the year. That child will undoubtedly have received *some* degree of more-than-trivial educational benefit during the short time she received specialized services. Under the Tenth Circuit's "merely * * * more than de *minimis*" test, that benefit would presumably satisfy the FAPE requirement. But no reasonable person would say that she received an "appropriate" education in any real sense of that word. 20 U.S.C. 1412(a)(1)(A).

Next imagine a middle-schooler whose autism results in both (1) a deficiency in his ability to read at grade level, and (2) a near-total inability to communicate with his peers in a school setting. For years, the school provides the child with specialized instruction to address the reading deficiency, but it does absolutely nothing to help the child improve his communication skills. The Tenth Circuit's standard would appear to be satisfied if the child makes any non-trivial improvement in reading—even though the school has ignored his communication problems and left him

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procedural FAPE inquiry). And the Court nowhere stated or implied that courts should ignore the term "appropriate" when conducting the FAPE inquiry in future cases.

entirely unprepared to succeed in high school and beyond.

Finally, consider a child who has a hearing impairment and requires assistive technology (such as an amplification device) in order to understand her teachers' instruction. See 20 U.S.C. 1401(1), 1414(d)(3)(B)(iv) and (v). If the child successfully employs the device in her social studies class—but her teachers refuse to use it in her math, reading, and science classes—the child may well make progress on her IEP goals in social studies, even while attaining no educational benefit whatsoever in any other subject.

In that circumstance, it would be absurd to describe the child's overall education as being "appropriate" for that child. Yet, under the "merely * * * more than *de minimis*" test, the child would nonetheless have received a FAPE. Notably, respondent does not deny that the Tenth Circuit would consider the FAPE requirement to be satisfied in these circumstances. See Supp. Br. in Opp. 10-11 (discussing this hypothetical). That concession lays bare the entirely illusory substantive protection offered by the Tenth Circuit's approach.

2. The IDEA's structure also undermines the "merely * * * more than *de minimis*" standard. As discussed in detail above, the IDEA makes clear that the IEP must be carefully tailored to the particular needs and abilities of each child, see 20 U.S.C. 1414(d)(1)(A)(i)(I), and it requires a clear statement of "measurable annual goals" in light of those needs and abilities, 20 U.S.C. 1414(d)(1)(A)(i)(II). Section 1414(d) also requires special education and related services to enable each child "to advance appropriately to-

ward attaining th[os]e annual goals." 20 U.S.C. 1414(d)(1)(A)(i)(IV); see pp. 18-19, *supra*.

Section 1414(d)'s description of the IEP requirements cannot be reconciled with the Tenth Circuit's approach. Congress would not have instructed States to develop each child's IEP with such a clear focus on promoting measureable annual progress—gauged in light of the particular needs and capabilities of each child—if all it wanted to require was that States provide some degree of educational benefit that is barely more than trivial.

3. Nor is the Tenth Circuit's standard consistent with Congress's purposes. As stated in the IDEA itself, those purposes include (1) "ensur[ing] the effectiveness" of education for children with disabilities; (2) "[i]mproving educational results for [such] children"; (3) promoting "equality of opportunity, full participation," and "economic self-sufficiency"; and (4) meeting the "unique needs" of children with disabilities and "prepar[ing] them for further education, employment, and independent living." 20 U.S.C. 1400(c)(1), (d)(1)(A), and (4). Congress also emphasized the need to set "high expectations"—and avoid "low expectations"—for children with disabilities. 20 U.S.C. 1400(c)(4) and (5)(A).

Those statements of congressional intent are not consistent with the Tenth Circuit's minimalist interpretation of the FAPE requirement. Indeed, if school districts provide benefits that are barely more than *de minimis*, it would be nearly impossible to accomplish Congress's stated goals. No reasonable school district sets out to provide educational benefits to its nondisabled children that are barely more than trivial. Providing children with disabilities such limited bene-

fits would therefore deprive them of any semblance of "equality of opportunity." 20 U.S.C. 1400(c)(1). And if the school provides benefits that are just above *de minimis*, it is hard to imagine that disabled children will be prepared for "further education, employment, and independent living" or "economic self-sufficiency." 20 U.S.C. 1400(d)(1)(A). Rather than promote "high expectations," the Tenth Circuit's standard expressly *lowers* expectations. 20 U.S.C. 1400(c)(5).

4. Neither the Tenth Circuit nor respondent have offered a persuasive explanation of how the "merely * * * more than de *minimis*" rule comports with the IDEA's text, structure, or history. The court of appeals appeared to believe that this standard is compelled by *Rowley*, and respondent relied heavily on *Rowley* in defending that rule at the certiorari stage. Both are mistaken: *Rowley* offers no support for the Tenth Circuit's standard, and in fact the decision affirmatively undermines that court's approach.

a. Respondent and the Tenth Circuit emphasize *Rowley*'s statement that the IDEA requires States to provide children with "*some* educational benefit," 458 U.S. 200 (emphasis added), and they appear to conclude that the Court's use of the word "some" means that anything more than nothing (or its legal equivalent of *de minimis*) is sufficient. That is not a reasonable interpretation of what the *Rowley* Court meant.

Most importantly, the Court was explicit that States must provide children with disabilities "access" to education that is "meaningful." *Rowley*, 458 U.S. at 192. As explained above, such access is "meaningful" only if it gives children the opportunity to obtain benefits—or to make progress—that is meaningful. See pp. 14-16, *supra*.

The Court also expressly stated that when a child "is being educated in the regular classrooms of the public educational system," the child's IEP must be calculated to "*enable the child to achieve passing marks and advance from grade to grade.*" *Rowley*, 458 U.S. 204 (emphasis added). The Court's explanation of how the FAPE requirement would apply in that circumstance makes clear that providing an educational benefit that is "merely * * * more than *de minimis*" does not suffice.

Respondent suggests that *Rowley*'s "meaningful" access requirement embraces no substantive standard at all, and merely requires compliance with the IDEA's procedural provisions. Supp. Br. in Opp. 8 ("Together, the IDEA's procedural requirements ensure that a child's 'access to public education' is 'meaningful.'") (quoting *Rowley*, 458 U.S. at 192). But that contradicts the very sentence in which the "meaningful" access requirement appears. 458 U.S. at 192. In that sentence, the Court expressly referred to the "meaningful" access requirement as a "*substantive educational standard.*" *Ibid.* (emphasis added). Respondent's interpretation of *Rowley* makes sense only if the language of that decision is ignored.

b. The Tenth Circuit's test also cannot be reconciled with *Rowley*'s emphasis on the "dramatically" different capabilities of different children with different disabilities. 458 U.S. at 202. *Rowley* cited those different capabilities in explaining why it was declining "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Ibid.* The Tenth Circuit's test focuses only on whether the child has attained some degree of non-trivial benefit, and it does

not require any consideration of how that benefit compares to the child's capabilities and potential. In doing so, the test departs from the child-specific analysis envisioned by *Rowley*.

Curiously, respondent agrees (Supp. Br. in Opp. 11) that "[a]n IEP's substantive adequacy" must "always [be] gauged in relation to *individualized* goals based on an *individualized* assessment of a student's needs." But respondent fails to explain how a "merely * * * more than *de minimis*" standard is actually consistent with that individualized approach. By its terms, the Tenth Circuit's test requires a binary inquiry into whether the child has been offered anything more than the legal equivalent of nothing. If so, then the FAPE requirement is automatically satisfied—regardless of whether the child is capable of achieving a lot more, a little more, or something in between. That sort of lowest-common-denominator, one-size-fits-all approach is not what Congress intended when it guaranteed eligible children the right to an "appropriate" education.

5. This Court's interpretation of the FAPE requirement will have practical, everyday consequences for the approximately 6.7 million children with disabilities who are covered by the IDEA.[9] The FAPE requirement is the statutory mandate "most fundamental" to the IDEA. *Winkelman* v. *Parma City Sch. Dist.*, 550 U.S. 516, 530 (2007). If school districts are told that the IDEA only requires them to provide eligible children with educational benefits that are

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[9] U.S. Dep't of Educ., *38th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, 2016* 250, http://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/index.html#download.

"merely * * * more than *de minimis*"—*i.e.*, if they are told that it is perfectly fine to aim low—they are less likely to offer the same educational opportunities than if they are told that they must give such children a chance to make significant progress.

As a practical matter, the legal standard will thus shape the conduct and choices of educators and parents when developing IEPs for children with disabilities. It will also guide hearing officers and courts adjudicating disputes between parents and schools, because the "[t]he adequacy of the [child's] educational program is" typically the "central issue" in IDEA litigation. *Winkelman*, 550 U.S. at 532; see 20 U.S.C. 1415(f)(3)(E).

The central role played by the FAPE requirement in the IDEA's scheme makes it especially important for this Court to reject the Tenth Circuit's "merely * * * more than *de minimis*" standard. That standard is—on its face—antithetical to Congress's goal of raising expectations for such children. For the reasons set forth above, the best way to vindicate the IDEA's text and purpose is to require schools to provide eligible children with an opportunity to make significant educational progress.

CONCLUSION

The court of appeals' decision should be vacated and the case should be remanded for assessment under the correct standard.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
VANITA GUPTA
Principal Deputy Assistant Attorney General
IRVING L. GORNSTEIN
Counselor to the Solicitor General
ROMAN MARTINEZ
Assistant to the Solicitor General
SHARON M. MCGOWAN
JENNIFER LEVIN EICHHORN
Attorneys

JAMES COLE, JR.
General Counsel
FRANCISCO LOPEZ
ERIC MOLL
Attorneys
U.S. Department of Education

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APPENDIX

1. 20 U.S.C. 1400 provides:

Short title; findings; purposes

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Omitted

(c) Findings

Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142), the educational needs of millions of children with disabilities were not being fully met because—

(A) the children did not receive appropriate educational services;

(B) the children were excluded entirely from the public school system and from being educated with their peers;

(C) undiagnosed disabilities prevented the children from having a successful educational experience; or

(D) a lack of adequate resources within the public school system forced families to find services outside the public school system.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

(4) However, the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

(5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—

(A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to—

(i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and

(ii) be prepared to lead productive and independent adult lives, to the maximum extent possible;

(B) strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home;

(C) coordinating this chapter with other local, educational service agency, State, and Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965 [20 U.S.C. 6301 et seq.], in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent;

(D) providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate;

(E) supporting high-quality, intensive preservice preparation and professional development for all personnel who work with children with disabilities in order to ensure that such personnel have the skills and knowledge necessary to improve the academic achievement and functional performance of children with disabilities, including the use of scientifically based instructional practices, to the maximum extent possible;

(F) providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children;

(G) focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results; and

(H) supporting the development and use of technology, including assistive technology devices and assistive technology services, to maximize accessibility for children with disabilities.

(6) While States, local educational agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.

(7) A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals.

(8) Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways.

(9) Teachers, schools, local educational agencies, and States should be relieved of irrelevant and

unnecessary paperwork burdens that do not lead to improved educational outcomes.

(10)(A) The Federal Government must be responsive to the growing needs of an increasingly diverse society.

(B) America's ethnic profile is rapidly changing. In 2000, 1 of every 3 persons in the United States was a member of a minority group or was limited English proficient.

(C) Minority children comprise an increasing percentage of public school students.

(D) With such changing demographics, recruitment efforts for special education personnel should focus on increasing the participation of minorities in the teaching profession in order to provide appropriate role models with sufficient knowledge to address the special education needs of these students.

(11)(A) The limited English proficient population is the fastest growing in our Nation, and the growth is occurring in many parts of our Nation.

(B) Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education.

(C) Such discrepancies pose a special challenge for special education in the referral of, assessment of, and provision of services for, our Nation's students from non-English language backgrounds.

(12)(A) Greater efforts are needed to prevent the intensification of problems connected with misla-

beling and high dropout rates among minority children with disabilities.

(B) More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.

(C) African-American children are identified as having intellectual disabilities and emotional disturbance at rates greater than their White counterparts.

(D) In the 1998-1999 school year, African-American children represented just 14.8 percent of the population aged 6 through 21, but comprised 20.2 percent of all children with disabilities.

(E) Studies have found that schools with predominately White students and teachers have placed disproportionately high numbers of their minority students into special education.

(13)(A) As the number of minority students in special education increases, the number of minority teachers and related services personnel produced in colleges and universities continues to decrease.

(B) The opportunity for full participation by minority individuals, minority organizations, and Historically Black Colleges and Universities in awards for grants and contracts, boards of organizations receiving assistance under this chapter, peer review panels, and training of professionals in the area of special education is essential to obtain greater success in the education of minority children with disabilities.

(14) As the graduation rates for children with disabilities continue to climb, providing effective transition services to promote successful post-school employment or education is an important measure of accountability for children with disabilities.

(d) Purposes

The purposes of this chapter are—

(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

2. 20 U.S.C. 1401 provides in pertinent part:

Definitions

Except as otherwise provided, in this chapter:

* * * * *

(3) Child with a disability

(A) In general

The term "child with a disability" means a child—

(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

(B) Child aged 3 through 9

The term "child with a disability" for a child aged 3 through 9 (or any subset of that age range, including ages 3 through 5), may, at the discretion of the State and the local educational agency, include a child—

(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in 1 or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development; and

(ii) who, by reason thereof, needs special education and related services.

* * * * *

(9) Free appropriate public education

The term "free appropriate public education" means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

* * * * *

(29) Special education

The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

3. 20 U.S.C. 1406 provides:

Requirements for prescribing regulations

(a) In general

In carrying out the provisions of this chapter, the Secretary shall issue regulations under this chapter only to the extent that such regulations are necessary to ensure that there is compliance with the specific requirements of this chapter.

(b) Protections provided to children

The Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this chapter that—

(1) violates or contradicts any provision of this chapter; or

(2) procedurally or substantively lessens the protections provided to children with disabilities under this chapter, as embodied in regulations in effect on July 20, 1983 (particularly as such protections related to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timelines, attendance of evaluation personnel at individualized education program meetings, or qualifications of personnel), except to the extent that such regulation reflects

the clear and unequivocal intent of Congress in legislation.

(c) Public comment period

The Secretary shall provide a public comment period of not less than 75 days on any regulation proposed under subchapter II or subchapter III on which an opportunity for public comment is otherwise required by law.

(d) Policy letters and statements

The Secretary may not issue policy letters or other statements (including letters or statements regarding issues of national significance) that—

(1) violate or contradict any provision of this chapter; or

(2) establish a rule that is required for compliance with, and eligibility under, this chapter without following the requirements of section 553 of title 5.

(e) Explanation and assurances

Any written response by the Secretary under subsection (d) regarding a policy, question, or interpretation under subchapter II shall include an explanation in the written response that—

(1) such response is provided as informal guidance and is not legally binding;

(2) when required, such response is issued in compliance with the requirements of section 553 of title 5; and

(3) such response represents the interpretation by the Department of Education of the applicable

statutory or regulatory requirements in the context of the specific facts presented.

(f) Correspondence from Department of Education describing interpretations of this chapter

(1) In general

The Secretary shall, on a quarterly basis, publish in the Federal Register, and widely disseminate to interested entities through various additional forms of communication, a list of correspondence from the Department of Education received by individuals during the previous quarter that describes the interpretations of the Department of Education of this chapter or the regulations implemented pursuant to this chapter.

(2) Additional information

For each item of correspondence published in a list under paragraph (1), the Secretary shall—

(A) identify the topic addressed by the correspondence and shall include such other summary information as the Secretary determines to be appropriate; and

(B) ensure that all such correspondence is issued, where applicable, in compliance with the requirements of section 553 of title 5.

4. 20 U.S.C. 1412(a) provides*:

State eligibility

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

(1) Free appropriate public education

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

(B) Limitation

The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children—

(i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges; and

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* As amended by the Every Student Succeeds Act (2015) (ESSA), Pub. L. No. 114-95, §§ 9214(d)(2)(A), (B), and (C), 9215(ss)(3)(A)(i), (ii), (B)(i), and (ii), 129 Stat. 2164-2165, 2182.

(ii) aged 18 through 21 to the extent that State law does not require that special education and related services under this subchapter be provided to children with disabilities who, in the educational placement prior to their incarceration in an adult correctional facility—

(I) were not actually identified as being a child with a disability under section 1401 of this title; or

(II) did not have an individualized education program under this subchapter.

(C) State flexibility

A State that provides early intervention services in accordance with subchapter III to a child who is eligible for services under section 1419 of this title, is not required to provide such child with a free appropriate public education.

(2) Full educational opportunity goal

The State has established a goal of providing full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal.

(3) Child find

(A) In general

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disa-

bilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

(B) Construction

Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.

(4) Individualized education program

An individualized education program, or an individualized family service plan that meets the requirements of section 1436(d) of this title, is developed, reviewed, and revised for each child with a disability in accordance with section 1414(d) of this title.

(5) Least restrictive environment

(A) In general

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the

use of supplementary aids and services cannot be achieved satisfactorily.

(B) Additional requirement

(i) In general

A State funding mechanism shall not result in placements that violate the requirements of subparagraph (A), and a State shall not use a funding mechanism by which the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability a free appropriate public education according to the unique needs of the child as described in the child's IEP.

(ii) Assurance

If the State does not have policies and procedures to ensure compliance with clause (i), the State shall provide the Secretary an assurance that the State will revise the funding mechanism as soon as feasible to ensure that such mechanism does not result in such placements.

(6) Procedural safeguards

(A) In general

Children with disabilities and their parents are afforded the procedural safeguards required by section 1415 of this title.

(B) Additional procedural safeguards

Procedures to ensure that testing and evaluation materials and procedures utilized for the pur-

poses of evaluation and placement of children with disabilities for services under this chapter will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(7) Evaluation

Children with disabilities are evaluated in accordance with subsections (a) through (c) of section 1414 of this title.

(8) Confidentiality

Agencies in the State comply with section 1417(c) of this title (relating to the confidentiality of records and information).

(9) Transition from subchapter III to preschool programs

Children participating in early intervention programs assisted under subchapter III, and who will participate in preschool programs assisted under this subchapter, experience a smooth and effective transition to those preschool programs in a manner consistent with section 1437(a)(9) of this title. By the third birthday of such a child, an individualized education program or, if consistent with sections 1414(d)(2)(B) and 1436(d) of this title, an individualized family service plan, has been developed and is being implemented for the child. The local educational agency will participate in transition plan-

ning conferences arranged by the designated lead agency under section 1435(a)(10) of this title.

(10) Children in private schools

(A) Children enrolled in private schools by their parents

(i) In general

To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary schools and secondary schools in the school district served by a local educational agency, provision is made for the participation of those children in the program assisted or carried out under this subchapter by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f):

(I) Amounts to be expended for the provision of those services (including direct services to parentally placed private school children) by the local educational agency shall be equal to a proportionate amount of Federal funds made available under this subchapter.

(II) In calculating the proportionate amount of Federal funds, the local educational agency, after timely and meaningful consultation with representatives of private schools as described in clause (iii), shall conduct a thorough and complete child find

process to determine the number of parentally placed children with disabilities attending private schools located in the local educational agency.

(III) Such services to parentally placed private school children with disabilities may be provided to the children on the premises of private, including religious, schools, to the extent consistent with law.

(IV) State and local funds may supplement and in no case shall supplant the proportionate amount of Federal funds required to be expended under this subparagraph.

(V) Each local educational agency shall maintain in its records and provide to the State educational agency the number of children evaluated under this subparagraph, the number of children determined to be children with disabilities under this paragraph, and the number of children served under this paragraph.

(ii) Child find requirement

(I) In general

The requirements of paragraph (3) (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including religious, elementary schools and secondary schools.

(II) Equitable participation

The child find process shall be designed to ensure the equitable participation of pa-

rentally placed private school children with disabilities and an accurate count of such children.

(III) Activities

In carrying out this clause, the local educational agency, or where applicable, the State educational agency, shall undertake activities similar to those activities undertaken for the agency's public school children.

(IV) Cost

The cost of carrying out this clause, including individual evaluations, may not be considered in determining whether a local educational agency has met its obligations under clause (i).

(V) Completion period

Such child find process shall be completed in a time period comparable to that for other students attending public schools in the local educational agency.

(iii) Consultation

To ensure timely and meaningful consultation, a local educational agency, or where appropriate, a State educational agency, shall consult with private school representatives and representatives of parents of parentally placed private school children with disabilities during the design and development of special education and related services for the children, including regarding—

(I) the child find process and how parentally placed private school children suspected of having a disability can participate equitably, including how parents, teachers, and private school officials will be informed of the process;

(II) the determination of the proportionate amount of Federal funds available to serve parentally placed private school children with disabilities under this subparagraph, including the determination of how the amount was calculated;

(III) the consultation process among the local educational agency, private school officials, and representatives of parents of parentally placed private school children with disabilities, including how such process will operate throughout the school year to ensure that parentally placed private school children with disabilities identified through the child find process can meaningfully participate in special education and related services;

(IV) how, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities, including a discussion of types of services, including direct services and alternate service delivery mechanisms, how such services will be apportioned if funds are insufficient to serve all children, and how and when these decisions will be made; and

(V) how, if the local educational agency disagrees with the views of the private school officials on the provision of services or the types of services, whether provided directly or through a contract, the local educational agency shall provide to the private school officials a written explanation of the reasons why the local educational agency chose not to provide services directly or through a contract.

(iv) Written affirmation

When timely and meaningful consultation as required by clause (iii) has occurred, the local educational agency shall obtain a written affirmation signed by the representatives of participating private schools, and if such representatives do not provide such affirmation within a reasonable period of time, the local educational agency shall forward the documentation of the consultation process to the State educational agency.

(v) Compliance

(I) In general

A private school official shall have the right to submit a complaint to the State educational agency that the local educational agency did not engage in consultation that was meaningful and timely, or did not give due consideration to the views of the private school official.

(II) Procedure

If the private school official wishes to submit a complaint, the official shall provide the basis of the noncompliance with this subparagraph by the local educational agency to the State educational agency, and the local educational agency shall forward the appropriate documentation to the State educational agency. If the private school official is dissatisfied with the decision of the State educational agency, such official may submit a complaint to the Secretary by providing the basis of the noncompliance with this subparagraph by the local educational agency to the Secretary, and the State educational agency shall forward the appropriate documentation to the Secretary.

(vi) Provision of equitable services

(I) Directly or through contracts

The provision of services pursuant to this subparagraph shall be provided—

(aa) by employees of a public agency; or

(bb) through contract by the public agency with an individual, association, agency, organization, or other entity.

(II) Secular, neutral, nonideological

Special education and related services provided to parentally placed private school children with disabilities, including mate-

rials and equipment, shall be secular, neutral, and nonideological.

(vii) Public control of funds

The control of funds used to provide special education and related services under this subparagraph, and title to materials, equipment, and property purchased with those funds, shall be in a public agency for the uses and purposes provided in this chapter, and a public agency shall administer the funds and property.

(B) Children placed in, or referred to, private schools by public agencies

(i) In general

Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

(ii) Standards

In all cases described in clause (i), the State educational agency shall determine whether such schools and facilities meet standards that apply to State educational agen-

cies and local educational agencies and that children so served have all the rights the children would have if served by such agencies.

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement

The cost of reimbursement described in clause (ii) may be reduced or denied—

(I) if—

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(iv) Exception

Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement—

(I) shall not be reduced or denied for failure to provide such notice if—

(aa) the school prevented the parent from providing such notice;

(bb) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(I); or

(cc) compliance with clause (iii)(I) would likely result in physical harm to the child; and

(II) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if—

(aa) the parent is illiterate or cannot write in English; or

(bb) compliance with clause (iii)(I) would likely result in serious emotional harm to the child.

(11) State educational agency responsible for general supervision

(A) In general

The State educational agency is responsible for ensuring that—

(i) the requirements of this subchapter are met;

(ii) all educational programs for children with disabilities in the State, including all such programs administered by any other State agency or local agency—

(I) are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and

(II) meet the educational standards of the State educational agency; and

(iii) in carrying out this subchapter with respect to homeless children, the requirements of subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.) are met.

(B) Limitation

Subparagraph (A) shall not limit the responsibility of agencies in the State other than the State educational agency to provide, or pay for some or all of the costs of, a free appropriate public education for any child with a disability in the State.

(C) Exception

Notwithstanding subparagraphs (A) and (B), the Governor (or another individual pursuant to State law), consistent with State law, may assign to any public agency in the State the responsibility of ensuring that the requirements of this subchapter are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons.

(12) Obligations related to and methods of ensuring services

(A) Establishing responsibility for services

The Chief Executive Officer of a State or designee of the officer shall ensure that an interagency agreement or other mechanism for interagency coordination is in effect between each public agency described in subparagraph (B) and the State educational agency, in order to ensure that all services described in subparagraph (B)(i) that are needed to ensure a free appropriate public education are provided, including the provision of such services during the pendency of any dispute under clause (iii). Such agreement or mechanism shall include the following:

(i) Agency financial responsibility

An identification of, or a method for defining, the financial responsibility of each agency for providing services described in subparagraph (B)(i) to ensure a free appropriate public education to children with disabilities, provided that the financial responsibility of each public agency described in

subparagraph (B), including the State medicaid agency and other public insurers of children with disabilities, shall precede the financial responsibility of the local educational agency (or the State agency responsible for developing the child's IEP).

(ii) Conditions and terms of reimbursement

The conditions, terms, and procedures under which a local educational agency shall be reimbursed by other agencies.

(iii) Interagency disputes

Procedures for resolving interagency disputes (including procedures under which local educational agencies may initiate proceedings) under the agreement or other mechanism to secure reimbursement from other agencies or otherwise implement the provisions of the agreement or mechanism.

(iv) Coordination of services procedures

Policies and procedures for agencies to determine and identify the interagency coordination responsibilities of each agency to promote the coordination and timely and appropriate delivery of services described in subparagraph (B)(i).

(B) Obligation of public agency

(i) In general

If any public agency other than an educational agency is otherwise obligated under Federal or State law, or assigned responsi-

bility under State policy pursuant to subparagraph (A), to provide or pay for any services that are also considered special education or related services (such as, but not limited to, services described in section 1401(1) relating to assistive technology devices, 1401(2) relating to assistive technology services, 1401(26) relating to related services, 1401(33) relating to supplementary aids and services, and 1401(34) of this title relating to transition services) that are necessary for ensuring a free appropriate public education to children with disabilities within the State, such public agency shall fulfill that obligation or responsibility, either directly or through contract or other arrangement pursuant to subparagraph (A) or an agreement pursuant to subparagraph (C).

(ii) Reimbursement for services by public agency

If a public agency other than an educational agency fails to provide or pay for the special education and related services described in clause (i), the local educational agency (or State agency responsible for developing the child's IEP) shall provide or pay for such services to the child. Such local educational agency or State agency is authorized to claim reimbursement for the services from the public agency that failed to provide or pay for such services and such public agency shall reimburse the local educational agency or State agency pursuant to

the terms of the interagency agreement or other mechanism described in subparagraph (A)(i) according to the procedures established in such agreement pursuant to subparagraph (A)(ii).

(C) Special rule

The requirements of subparagraph (A) may be met through—

(i) State statute or regulation;

(ii) signed agreements between respective agency officials that clearly identify the responsibilities of each agency relating to the provision of services; or

(iii) other appropriate written methods as determined by the Chief Executive Officer of the State or designee of the officer and approved by the Secretary.

(13) Procedural requirements relating to local educational agency eligibility

The State educational agency will not make a final determination that a local educational agency is not eligible for assistance under this subchapter without first affording that agency reasonable notice and an opportunity for a hearing.

(14) Personnel qualifications

(A) In general

The State educational agency has established and maintains qualifications to ensure that personnel necessary to carry out this subchapter are appropriately and adequately prepared and

trained, including that those personnel have the content knowledge and skills to serve children with disabilities.

(B) Related services personnel and paraprofessionals

The qualifications under subparagraph (A) include qualifications for related services personnel and paraprofessionals that—

(i) are consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services;

(ii) ensure that related services personnel who deliver services in their discipline or profession meet the requirements of clause (i) and have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(iii) allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulation, or written policy, in meeting the requirements of this subchapter to be used to assist in the provision of special education and related services under this subchapter to children with disabilities.

(C) Qualifications for special education teachers

The qualifications described in subparagraph (A) shall ensure that each person employed as a

special education teacher in the State who teaches elementary school, middle school, or secondary school—

(i) has obtained full State certification as a special education teacher (including participating in an alternate route to certification as a special educator, if such alternate route meets minimum requirements described in section 2005.56(a)(2)(ii) of title 34, Code of Federal Regulations, as such section was in effect on November 28, 2008), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher, except with respect to any teacher teaching in a public charter school who shall meet the requirements set forth in the State's public charter school law;

(ii) has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(iii) holds at least a bachelor's degree..[1]

(D) Policy

In implementing this section, a State shall adopt a policy that includes a requirement that local educational agencies in the State take measurable steps to recruit, hire, train, and retain personnel who meet the applicable requirements described in this paragraph to provide special ed-

[1] So in original.

ucation and related services under this subchapter to children with disabilities.

(E) Rule of construction

Notwithstanding any other individual right of action that a parent or student may maintain under this subchapter, nothing in this paragraph shall be construed to create a right of action on behalf of an individual student for the failure of a particular State educational agency or local educational agency staff person to meet the applicable requirements described in this paragraph, or to prevent a parent from filing a complaint about staff qualifications with the State educational agency as provided for under this subchapter.

(15) Performance goals and indicators

The State--

(A) has established goals for the performance of children with disabilities in the State that—

(i) promote the purposes of this chapter, as stated in section 1400(d) of this title;

(ii) are the same as the State's long-term goals and measurements of interim progress for children with disabilities under section 6311(c)(4)(A)(i) of this title;

(iii) address graduation rates and dropout rates, as well as such other factors as the State may determine; and

(iv) are consistent, to the extent appropriate, with any other goals and standards for children established by the State;

(B) has established performance indicators the State will use to assess progress toward achieving the goals described in subparagraph (A), including measurements of interim progress for children with disabilities under section 6311(c)(4)(A)(i) of this title; and

(C) will annually report to the Secretary and the public on the progress of the State, and of children with disabilities in the State, toward meeting the goals established under subparagraph (A), which may include elements of the reports required under section 6311(h) of this title.

(16) Participation in assessments

(A) In general

All children with disabilities are included in all general State and districtwide assessment programs, including assessments described under section 6311 of this title, with appropriate accommodations and alternate assessments where necessary and as indicated in their respective individualized education programs.

(B) Accommodation guidelines

The State (or, in the case of a districtwide assessment, the local educational agency) has developed guidelines for the provision of appropriate accommodations.

(C) Alternate assessments

(i) In general

The State (or, in the case of a districtwide assessment, the local educational agency) has developed and implemented guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in regular assessments under subparagraph (A) with accommodations as indicated in their respective individualized education programs.

(ii) Requirements for alternate assessments

The guidelines under clause (i) shall provide for alternate assessments that—

(I) are aligned with the challenging State academic content standards under section 6311(b)(1) of this title and alternate academic achievement standards under section 6311(b)(1)(E) of this title; and

(II) if the State has adopted alternate academic achievement standards permitted under section 6311(b)(1)(E) of this title, measure the achievement of children with disabilities against those standards.

(iii) Conduct of alternate assessments

The State conducts the alternate assessments described in this subparagraph.

(D) Reports

The State educational agency (or, in the case of a districtwide assessment, the local education-

al agency) makes available to the public, and reports to the public with the same frequency and in the same detail as it reports on the assessment of nondisabled children, the following:

(i) The number of children with disabilities participating in regular assessments, and the number of those children who were provided accommodations in order to participate in those assessments.

(ii) The number of children with disabilities participating in alternate assessments described in subparagraph (C)(ii)(I).

(iii) The number of children with disabilities participating in alternate assessments described in subparagraph (C)(ii)(II).

(iv) The performance of children with disabilities on regular assessments and on alternate assessments (if the number of children with disabilities participating in those assessments is sufficient to yield statistically reliable information and reporting that information will not reveal personally identifiable information about an individual student), compared with the achievement of all children, including children with disabilities, on those assessments.

(E) Universal design

The State educational agency (or, in the case of a districtwide assessment, the local educational agency) shall, to the extent feasible, use universal design principles in developing and ad-

ministering any assessments under this paragraph.

(17) Supplementation of State, local, and other Federal funds

(A) Expenditures

Funds paid to a State under this subchapter will be expended in accordance with all the provisions of this subchapter.

(B) Prohibition against commingling

Funds paid to a State under this subchapter will not be commingled with State funds.

(C) Prohibition against supplantation and conditions for waiver by Secretary

Except as provided in section 1413 of this title, funds paid to a State under this subchapter will be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this subchapter and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive, in whole or in part, the requirements of this subparagraph if the Secretary concurs with the evidence provided by the State.

(18) Maintenance of State financial support

(A) In general

The State does not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year.

(B) Reduction of funds for failure to maintain support

The Secretary shall reduce the allocation of funds under section 1411 of this title for any fiscal year following the fiscal year in which the State fails to comply with the requirement of subparagraph (A) by the same amount by which the State fails to meet the requirement.

(C) Waivers for exceptional or uncontrollable circumstances

The Secretary may waive the requirement of subparagraph (A) for a State, for 1 fiscal year at a time, if the Secretary determines that—

(i) granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State; or

(ii) the State meets the standard in paragraph (17)(C) for a waiver of the requirement to supplement, and not to supplant, funds received under this subchapter.

(D) Subsequent years

If, for any year, a State fails to meet the requirement of subparagraph (A), including any year for which the State is granted a waiver under subparagraph (C), the financial support required of the State in future years under subparagraph (A) shall be the amount that would have been required in the absence of that failure and not the reduced level of the State's support.

(19) Public participation

Prior to the adoption of any policies and procedures needed to comply with this section (including any amendments to such policies and procedures), the State ensures that there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities.

(20) Rule of construction

In complying with paragraphs (17) and (18), a State may not use funds paid to it under this subchapter to satisfy State-law mandated funding obligations to local educational agencies, including funding based on student attendance or enrollment, or inflation.

(21) State advisory panel

(A) In general

The State has established and maintains an advisory panel for the purpose of providing policy guidance with respect to special education and

related services for children with disabilities in the State.

(B) Membership

Such advisory panel shall consist of members appointed by the Governor, or any other official authorized under State law to make such appointments, be representative of the State population, and be composed of individuals involved in, or concerned with, the education of children with disabilities, including—

(i) parents of children with disabilities (ages birth through 26);

(ii) individuals with disabilities;

(iii) teachers;

(iv) representatives of institutions of higher education that prepare special education and related services personnel;

(v) State and local education officials, including officials who carry out activities under subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.);

(vi) administrators of programs for children with disabilities;

(vii) representatives of other State agencies involved in the financing or delivery of related services to children with disabilities;

(viii) representatives of private schools and public charter schools;

(ix) not less than 1 representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities;

(x) a representative from the State child welfare agency responsible for foster care; and

(xi) representatives from the State juvenile and adult corrections agencies.

(C) Special rule

A majority of the members of the panel shall be individuals with disabilities or parents of children with disabilities (ages birth through 26).

(D) Duties

The advisory panel shall—

(i) advise the State educational agency of unmet needs within the State in the education of children with disabilities;

(ii) comment publicly on any rules or regulations proposed by the State regarding the education of children with disabilities;

(iii) advise the State educational agency in developing evaluations and reporting on data to the Secretary under section 1418 of this title;

(iv) advise the State educational agency in developing corrective action plans to address findings identified in Federal monitoring reports under this subchapter; and

(v) advise the State educational agency in developing and implementing policies relating to the coordination of services for children with disabilities.

(22) Suspension and expulsion rates

(A) In general

The State educational agency examines data, including data disaggregated by race and ethnicity, to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities—

(i) among local educational agencies in the State; or

(ii) compared to such rates for nondisabled children within such agencies.

(B) Review and revision of policies

If such discrepancies are occurring, the State educational agency reviews and, if appropriate, revises (or requires the affected State or local educational agency to revise) its policies, procedures, and practices relating to the development and implementation of IEPs, the use of positive behavioral interventions and supports, and procedural safeguards, to ensure that such policies, procedures, and practices comply with this chapter.

(23) Access to instructional materials

(A) In general

The State adopts the National Instructional Materials Accessibility Standard for the purpos-

es of providing instructional materials to blind persons or other persons with print disabilities, in a timely manner after the publication of the National Instructional Materials Accessibility Standard in the Federal Register.

(B) Rights of State educational agency

Nothing in this paragraph shall be construed to require any State educational agency to coordinate with the National Instructional Materials Access Center. If a State educational agency chooses not to coordinate with the National Instructional Materials Access Center, such agency shall provide an assurance to the Secretary that the agency will provide instructional materials to blind persons or other persons with print disabilities in a timely manner.

(C) Preparation and delivery of files

If a State educational agency chooses to coordinate with the National Instructional Materials Access Center, not later than 2 years after December 3, 2004, the agency, as part of any print instructional materials adoption process, procurement contract, or other practice or instrument used for purchase of print instructional materials, shall enter into a written contract with the publisher of the print instructional materials to—

(i) require the publisher to prepare and, on or before delivery of the print instructional materials, provide to the National Instructional Materials Access Center electronic files containing the contents of the print instruc-

tional materials using the National Instructional Materials Accessibility Standard; or

(ii) purchase instructional materials from the publisher that are produced in, or may be rendered in, specialized formats.

(D) Assistive technology

In carrying out this paragraph, the State educational agency, to the maximum extent possible, shall work collaboratively with the State agency responsible for assistive technology programs.

(E) Definitions

In this paragraph:

(i) National Instructional Materials Access Center

The term "National Instructional Materials Access Center" means the center established pursuant to section 1474(e) of this title.

(ii) National Instructional Materials Accessibility Standard

The term "National Instructional Materials Accessibility Standard" has the meaning given the term in section 1474(e)(3)(A) of this title.

(iii) Specialized formats

The term "specialized formats" has the meaning given the term in section 1474(e)(3)(D) of this title.

(24) Overidentification and disproportionality

The State has in effect, consistent with the purposes of this chapter and with section 1418(d) of this title, policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment described in section 1401 of this title.

(25) Prohibition on mandatory medication

(A) In general

The State educational agency shall prohibit State and local educational agency personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act (21 U.S.C. 801 et seq.) as a condition of attending school, receiving an evaluation under subsection (a) or (c) of section 1414 of this title, or receiving services under this chapter.

(B) Rule of construction

Nothing in subparagraph (A) shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services under paragraph (3).

5. 20 U.S.C. 1414 provides in pertinent part*:

Evaluations, eligibility determinations, individualized education programs, and educational placements

* * * * *

(b) Evaluation procedures

(1) Notice

The local educational agency shall provide notice to the parents of a child with a disability, in accordance with subsections (b)(3), (b)(4), and (c) of section 1415 of this title, that describes any evaluation procedures such agency proposes to conduct.

(2) Conduct of evaluation

In conducting the evaluation, the local educational agency shall—

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining—

(i) whether the child is a child with a disability; and

(ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

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* As amended by the ESSA, Pub. L. No. 114-95, § 9215(ss)(5), 129 Stat. 2182.

(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(3) Additional requirements

Each local educational agency shall ensure that—

(A) assessments and other evaluation materials used to assess a child under this section—

(i) are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer;

(iii) are used for purposes for which the assessments or measures are valid and reliable;

(iv) are administered by trained and knowledgeable personnel; and

(v) are administered in accordance with any instructions provided by the producer of such assessments;

(B) the child is assessed in all areas of suspected disability;

(C) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided; and

(D) assessments of children with disabilities who transfer from 1 school district to another school district in the same academic year are coordinated with such children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.

(4) Determination of eligibility and educational need

Upon completion of the administration of assessments and other evaluation measures—

(A) the determination of whether the child is a child with a disability as defined in section 1401(3) of this title and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5); and

(B) a copy of the evaluation report and the documentation of determination of eligibility shall be given to the parent.

(5) Special rule for eligibility determination

In making a determination of eligibility under paragraph (4)(A), a child shall not be determined to be a child with a disability if the determinant factor for such determination is—

(A) lack of appropriate instruction in reading, including in the essential components of reading instruction (as defined in section 6368(3) of this title, as such section was in effect on the day before December 10, 2015);

(B) lack of instruction in math; or

(C) limited English proficiency.

(6) Specific learning disabilities

(A) In general

Notwithstanding section 1406(b) of this title, when determining whether a child has a specific learning disability as defined in section 1401 of this title, a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.

(B) Additional authority

In determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based interven-

tion as a part of the evaluation procedures described in paragraphs (2) and (3).

* * * * *

(d) Individualized education programs

(1) Definitions

In this chapter:

(A) Individualized education program

(i) In general

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child's present levels of academic achievement and functional performance, including—

(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412(a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and

(VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter—

(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

(bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and

(cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title.

(ii) Rule of construction

Nothing in this section shall be construed to require—

(I) that additional information be included in a child's IEP beyond what is explicitly required in this section; and

(II) the IEP Team to include information under 1 component of a child's IEP that is already contained under another component of such IEP.

(B) Individualized education program team

The term "individualized education program team" or "IEP Team" means a group of individuals composed of—

(i) the parents of a child with a disability;

(ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

(iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;

(iv) a representative of the local educational agency who—

(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(II) is knowledgeable about the general education curriculum; and

(III) is knowledgeable about the availability of resources of the local educational agency;

(v) an individual who can interpret the instructional implications of evaluation results,

who may be a member of the team described in clauses (ii) through (vi);

(vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(vii) whenever appropriate, the child with a disability.

(C) IEP Team attendance

(i) Attendance not necessary

A member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the local educational agency agree that the attendance of such member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

(ii) Excusal

A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if—

(I) the parent and the local educational agency consent to the excusal; and

(II) the member submits, in writing to the parent and the IEP Team, input into

the development of the IEP prior to the meeting.

(iii) Written agreement and consent required

A parent's agreement under clause (i) and consent under clause (ii) shall be in writing.

(D) IEP Team transition

In the case of a child who was previously served under subchapter III, an invitation to the initial IEP meeting shall, at the request of the parent, be sent to the subchapter III service coordinator or other representatives of the subchapter III system to assist with the smooth transition of services.

(2) Requirement that program be in effect

(A) In general

At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program, as defined in paragraph (1)(A).

(B) Program for child aged 3 through 5

In the case of a child with a disability aged 3 through 5 (or, at the discretion of the State educational agency, a 2-year-old child with a disability who will turn age 3 during the school year), the IEP Team shall consider the individualized family service plan that contains the material described in section 1436 of this title, and that is developed in accordance with this section, and

the individualized family service plan may serve as the IEP of the child if using that plan as the IEP is—

(i) consistent with State policy; and

(ii) agreed to by the agency and the child's parents.

(C) Program for children who transfer school districts

(i) In general

(I) Transfer within the same State

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.

(II) Transfer outside State

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the local educational agency

shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation pursuant to subsection (a)(1), if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.

(ii) Transmittal of records

To facilitate the transition for a child described in clause (i)—

(I) the new school in which the child enrolls shall take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous school in which the child was enrolled, pursuant to section 99.31(a)(2) of title 34, Code of Federal Regulations; and

(II) the previous school in which the child was enrolled shall take reasonable steps to promptly respond to such request from the new school.

(3) Development of IEP

(A) In general

In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider—

(i) the strengths of the child;

(ii) the concerns of the parents for enhancing the education of their child;

(iii) the results of the initial evaluation or most recent evaluation of the child; and

(iv) the academic, developmental, and functional needs of the child.

(B) Consideration of special factors

The IEP Team shall—

(i) in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;

(ii) in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP;

(iii) in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) consider the communication needs of the child, and in the case of a child who is deaf

or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) consider whether the child needs assistive technology devices and services.

(C) Requirement with respect to regular education teacher

A regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and the determination of supplementary aids and services, program modifications, and support for school personnel consistent with paragraph (1)(A)(i)(IV).

(D) Agreement

In making changes to a child's IEP after the annual IEP meeting for a school year, the parent of a child with a disability and the local educational agency may agree not to convene an IEP meeting for the purposes of making such changes, and instead may develop a written document to amend or modify the child's current IEP.

(E) Consolidation of IEP Team meetings

To the extent possible, the local educational agency shall encourage the consolidation of reevaluation meetings for the child and other IEP Team meetings for the child.

(F) Amendments

Changes to the IEP may be made either by the entire IEP Team or, as provided in subparagraph (D), by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent shall be provided with a revised copy of the IEP with the amendments incorporated.

(4) Review and revision of IEP

(A) In general

The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team—

(i) reviews the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved; and

(ii) revises the IEP as appropriate to address—

(I) any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate;

(II) the results of any reevaluation conducted under this section;

(III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B);

(IV) the child's anticipated needs; or

(V) other matters.

(B) Requirement with respect to regular education teacher

A regular education teacher of the child, as a member of the IEP Team, shall, consistent with paragraph (1)(C), participate in the review and revision of the IEP of the child.

(5) Multi-year IEP demonstration

(A) Pilot program

(i) Purpose

The purpose of this paragraph is to provide an opportunity for States to allow parents and local educational agencies the opportunity for long-term planning by offering the option of developing a comprehensive multi-year IEP, not to exceed 3 years, that is designed to coincide with the natural transition points for the child.

(ii) Authorization

In order to carry out the purpose of this paragraph, the Secretary is authorized to approve not more than 15 proposals from States to carry out the activity described in clause (i).

(iii) Proposal

(I) In general

A State desiring to participate in the program under this paragraph shall submit a proposal to the Secretary at such time and in such manner as the Secretary may reasonably require.

(II) Content

The proposal shall include—

(aa) assurances that the development of a multi-year IEP under this paragraph is optional for parents;

(bb) assurances that the parent is required to provide informed consent before a comprehensive multi-year IEP is developed;

(cc) a list of required elements for each multi-year IEP, including—

(AA) measurable goals pursuant to paragraph (1)(A)(i)(II), coinciding with natural transition points for the child, that will enable the child to be involved in and make progress in the general education curriculum and that will meet the child's other needs that result from the child's disability; and

(BB) measurable annual goals for determining progress toward meeting the goals described in subitem (AA); and

(dd) a description of the process for the review and revision of each multi-year IEP, including—

(AA) a review by the IEP Team of the child's multi-year IEP at each of the child's natural transition points;

(BB) in years other than a child's natural transition points, an annual review of the child's IEP to determine the child's current levels of progress and whether the annual goals for the child are being achieved, and a requirement to amend the IEP, as appropriate, to enable the child to continue to meet the measurable goals set out in the IEP;

(CC) if the IEP Team determines on the basis of a review that the child is not making sufficient progress toward the goals described in the multi-year IEP, a requirement that the local educational agency shall ensure that the IEP Team carries out a more thorough review of the IEP in accordance with paragraph (4) within 30 calendar days; and

(DD) at the request of the parent, a requirement that the IEP Team shall conduct a review of the child's multi-year IEP rather than or subsequent to an annual review.

(B) Report

Beginning 2 years after December 3, 2004, the Secretary shall submit an annual report to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate regarding the effectiveness of the program under this paragraph and any specific recommendations for broader implementation of such program, including—

(i) reducing—

(I) the paperwork burden on teachers, principals, administrators, and related service providers; and

(II) noninstructional time spent by teachers in complying with this subchapter;

(ii) enhancing longer-term educational planning;

(iii) improving positive outcomes for children with disabilities;

(iv) promoting collaboration between IEP Team members; and

(v) ensuring satisfaction of family members.

(C) Definition

In this paragraph, the term "natural transition points" means those periods that are close in time to the transition of a child with a disability from preschool to elementary grades, from ele-

mentary grades to middle or junior high school grades, from middle or junior high school grades to secondary school grades, and from secondary school grades to post-secondary activities, but in no case a period longer than 3 years.

(6) Failure to meet transition objectives

If a participating agency, other than the local educational agency, fails to provide the transition services described in the IEP in accordance with paragraph (1)(A)(i)(VIII), the local educational agency shall reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in the IEP.

(7) Children with disabilities in adult prisons

(A) In general

The following requirements shall not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

(i) The requirements contained in section 1412(a)(16) of this title and paragraph (1)(A)(i)(VI) (relating to participation of children with disabilities in general assessments).

(ii) The requirements of items (aa) and (bb) of paragraph (1)(A)(i)(VIII) (relating to transition planning and transition services), do not apply with respect to such children whose eligibility under this subchapter will end, because of such children's age, before such children will be released from prison.

(B) Additional requirement

If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child's IEP Team may modify the child's IEP or placement notwithstanding the requirements of sections[1] 1412(a)(5)(A) of this title and paragraph (1)(A) if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(e) Educational placements

Each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

(f) Alternative means of meeting participation

When conducting IEP team[2] meetings and placement meetings pursuant to this section, section 1415(e) of this title, and section 1415(f)(1)(B) of this title, and carrying out administrative matters under section 1415 of this title (such as scheduling, exchange of witness lists, and status conferences), the parent of a child with a disability and a local educational agency may agree to use alternative means of meeting participation, such as video conferences and conference calls.

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[1] So in original. Probably should be "section".

[2] So in original. Probably should be capitalized.

6. 20 U.S.C. 1415(i) provides:

Procedural safeguards

(i) Administrative procedures

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2).

(B) Decision made at appeal

A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2).

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

(B) Limitation

The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this subchapter, in such time as the State law allows.

(C) Additional requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees

(i) In general

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—

(I) to a prevailing party who is the parent of a child with a disability;

(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(ii) Rule of construction

Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(C) Determination of amount of attorneys' fees

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services

(i) In general

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) IEP Team meetings

Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).

(iii) Opportunity to resolve complaints

A meeting conducted pursuant to subsection (f)(1)(B)(i) shall not be considered—

(I) a meeting convened as a result of an administrative hearing or judicial action; or

(II) an administrative hearing or judicial action for purposes of this paragraph.

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees

Except as provided in subparagraph (G), whenever the court finds that—

(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A),

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

7. 20 U.S.C. 6311 provides in pertinent part*:

State plans

(a) Filing for grants

(1) In general

For any State desiring to receive a grant under this part, the State educational agency shall file with the Secretary a plan that is—

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* As amended by the ESSA, Pub. L. No. 114-95, § 1005, 129 Stat. 1820.

(A) developed by the State educational agency with timely and meaningful consultation with the Governor, members of the State legislature and State board of education (if the State has a State board of education), local educational agencies (including those located in rural areas), representatives of Indian tribes located in the State, teachers, principals, other school leaders, charter school leaders (if the State has charter schools), specialized instructional support personnel, paraprofessionals, administrators, other staff, and parents; and

(B) is coordinated with other programs under this chapter, the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), the Rehabilitation Act of 1973 (20 U.S.C. 701 et seq.),[1] the Carl D. Perkins Career and Technical Education Act of 2006 (20 U.S.C. 2301 et seq.), the Workforce Innovation and Opportunity Act (29 U.S.C. 3101 et seq.), the Head Start Act (42 U.S.C. 9831 et seq.), the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858 et seq.),[2] the Education Sciences Reform Act of 2002 (20 U.S.C. 9501 et seq.), the Education[3] Technical Assistance Act of 2002 (20 U.S.C. 9601 et. seq.), the National Assessment of Educational Progress Authorization Act (20 U.S.C. 9621 et seq.), the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11301 et seq.), and the Adult Ed-

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[1] So in original. Probably should be "(29 U.S.C. 701 et seq.),".

[2] So in original. Probably should be "9857 et seq.),".

[3] So in original. Probably should be "Educational".

ucation and Family Literacy Act (29 U.S.C. 3271 et seq.).

* * * * *

(b) Challenging academic standards and academic assessments

(1) Challenging State academic standards

(A) In general

Each State, in the plan it files under subsection (a), shall provide an assurance that the State has adopted challenging academic content standards and aligned academic achievement standards (referred to in this chapter as "challenging State academic standards"), which achievement standards shall include not less than 3 levels of achievement, that will be used by the State, its local educational agencies, and its schools to carry out this part. A State shall not be required to submit such challenging State academic standards to the Secretary.

(B) Same standards

Except as provided in subparagraph (E), the standards required by subparagraph (A) shall—

(i) apply to all public schools and public school students in the State; and

(ii) with respect to academic achievement standards, include the same knowledge, skills, and levels of achievement expected of all public school students in the State.

(C) Subjects

The State shall have such academic standards for mathematics, reading or language arts, and science, and may have such standards for any other subject determined by the State.

(D) Alignment

(i) In general

Each State shall demonstrate that the challenging State academic standards are aligned with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant State career and technical education standards

(ii) Rule of construction

Nothing in this chapter shall be construed to authorize public institutions of higher education to determine the specific challenging State academic standards required under this paragraph.

(E) Alternate academic achievement standards for students with the most significant cognitive disabilities

(i) In general

The State may, through a documented and validated standards-setting process, adopt alternate academic achievement standards for students with the most significant cognitive disabilities, provided those standards—

(I) are aligned with the challenging State academic content standards under subparagraph (A);

(II) promote access to the general education curriculum, consistent with the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.);

(III) reflect professional judgment as to the highest possible standards achievable by such students;

(IV) are designated in the individualized education program developed under section 614(d)(3) of the Individuals with Disabilities Education Act (20 U.S.C. 1414(d)(3)) for each such student as the academic achievement standards that will be used for the student; and

(V) are aligned to ensure that a student who meets the alternate academic achievement standards is on track to pursue postsecondary education or employment, consistent with the purposes of Public Law 93-112 [29 U.S.C. 701 et seq.], as in effect on July 22, 2014.

(ii) Prohibition on any other alternate or modified academic achievement standards

A State shall not develop, or implement for use under this part, any alternate academic achievement standards for children with disabilities that are not alternate academic achievement standards that meet the requirements of clause (i).

(F) English language proficiency standards

Each State plan shall demonstrate that the State has adopted English language proficiency standards that—

(i) are derived from the 4 recognized domains of speaking, listening, reading, and writing;

(ii) address the different proficiency levels of English learners; and

(iii) are aligned with the challenging State academic standards.

(G) Prohibitions

(i) Standards review or approval

A State shall not be required to submit any standards developed under this subsection to the Secretary for review or approval.

(ii) Federal control

The Secretary shall not have the authority to mandate, direct, control, coerce, or exercise any direction or supervision over any of the challenging State academic standards adopted or implemented by a State.

(H) Existing standards

Nothing in this part shall prohibit a State from revising, consistent with this section, any standards adopted under this part before or after December 10, 2015.

(2) Academic assessments

(A) In general

Each State plan shall demonstrate that the State educational agency, in consultation with local educational agencies, has implemented a set of high-quality student academic assessments in mathematics, reading or language arts, and science. The State retains the right to implement such assessments in any other subject chosen by the State.

(B) Requirements

The assessments under subparagraph (A) shall—

(i) except as provided in subparagraph (D), be—

(I) the same academic assessments used to measure the achievement of all public elementary school and secondary school students in the State; and

(II) administered to all public elementary school and secondary school students in the State;

(ii) be aligned with the challenging State academic standards, and provide coherent and timely information about student attainment of such standards and whether the student is performing at the student's grade level;

(iii) be used for purposes for which such assessments are valid and reliable, consistent with relevant, nationally recognized profes-

sional and technical testing standards, objectively measure academic achievement, knowledge, and skills, and be tests that do not evaluate or assess personal or family beliefs and attitudes, or publicly disclose personally identifiable information;

(iv) be of adequate technical quality for each purpose required under this chapter and consistent with the requirements of this section, the evidence of which shall be made public, including on the website of the State educational agency;

(v)(I) in the case of mathematics and reading or language arts, be administered—

(aa) in each of grades 3 through 8; and

(bb) at least once in grades 9 through 12;

(II) in the case of science, be administered not less than one time during—

(aa) grades 3 through 5;

(bb) grades 6 through 9; and

(c)(c) grades 10 through 12; and

(III) in the case of any other subject chosen by the State, be administered at the discretion of the State;

(vi) involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding, which may include

measures of student academic growth and may be partially delivered in the form of portfolios, projects, or extended performance tasks;

(vii) provide for—

(I) the participation in such assessments of all students;

(II) the appropriate accommodations, such as interoperability with, and ability to use, assistive technology, for children with disabilities (as defined in section 602(3) of the Individuals with Disabilities Education Act (20 U.S.C. 1401(3))), including students with the most significant cognitive disabilities, and students with a disability who are provided accommodations under an Act other than the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), necessary to measure the academic achievement of such children relative to the challenging State academic standards or alternate academic achievement standards described in paragraph (1)(E); and

(III) the inclusion of English learners, who shall be assessed in a valid and reliable manner and provided appropriate accommodations on assessments administered to such students under this paragraph, including, to the extent practicable, assessments in the language and form most likely to yield accurate data on what such students know and can do in academic

content areas, until such students have achieved English language proficiency, as determined under subparagraph (G);

(viii) at the State's discretion—

(I) be administered through a single summative assessment; or

(II) be administered through multiple statewide interim assessments during the course of the academic year that result in a single summative score that provides valid, reliable, and transparent information on student achievement or growth;

(ix) notwithstanding clause (vii)(III), provide for assessments (using tests in English) of reading or language arts of any student who has attended school in the United States (not including the Commonwealth of Puerto Rico) for 3 or more consecutive school years, except that if the local educational agency determines, on a case-by-case individual basis, that academic assessments in another language or form would likely yield more accurate and reliable information on what such student knows and can do, the local educational agency may make a determination to assess such student in the appropriate language other than English for a period that does not exceed 2 additional consecutive years, provided that such student has not yet reached a level of English language proficiency sufficient to yield valid and reliable information on what such student knows and can do on tests

(written in English) of reading or language arts;

(x) produce individual student interpretive, descriptive, and diagnostic reports, consistent with clause (iii), regarding achievement on such assessments that allow parents, teachers, principals, and other school leaders to understand and address the specific academic needs of students, and that are provided to parents, teachers, and school leaders, as soon as is practicable after the assessment is given, in an understandable and uniform format, and to the extent practicable, in a language that parents can understand;

(xi) enable results to be disaggregated within each State, local educational agency, and school by—

(I) each major racial and ethnic group;

(II) economically disadvantaged students as compared to students who are not economically disadvantaged;

(III) children with disabilities as compared to children without disabilities;

(IV) English proficiency status;

(V) gender; and

(VI) migrant status,

except that such disaggregation shall not be required in the case of a State, local educational agency, or a school in which the number of students in a subgroup is insufficient to

yield statistically reliable information or the results would reveal personally identifiable information about an individual student;

(xii) enable itemized score analyses to be produced and reported, consistent with clause (iii), to local educational agencies and schools, so that parents, teachers, principals, other school leaders, and administrators can interpret and address the specific academic needs of students as indicated by the students' achievement on assessment items; and

(xiii) be developed, to the extent practicable, using the principles of universal design for learning.

(C) Exception for advanced mathematics in middle school

A State may exempt any 8th grade student from the assessment in mathematics described in subparagraph (B)(v)(I)(aa) if—

(i) such student takes the end-of-course assessment the State typically administers to meet the requirements of subparagraph (B)(v)(I)(bb) in mathematics;

(ii) such student's achievement on such end-of-course assessment is used for purposes of subsection (c)(4)(B)(i), in lieu of such student's achievement on the mathematics assessment required under subparagraph (B)(v)(I)(aa), and such student is counted as

participating in the assessment for purposes of subsection (c)(4)(B)(vi);[4] and

(iii) in high school, such student takes a mathematics assessment pursuant to subparagraph (B)(v)(I)(bb) that—

(I) is any end-of-course assessment or other assessment that is more advanced than the assessment taken by such student under clause (i) of this subparagraph; and

(II) shall be used to measure such student's academic achievement for purposes of subsection (c)(4)(B)(i).

(D) Alternate assessments for students with the most significant cognitive disabilities

(i) Alternate assessments aligned with alternate academic achievement standards

A State may provide for alternate assessments aligned with the challenging State academic standards and alternate academic achievement standards described in paragraph (1)(E) for students with the most significant cognitive disabilities, if the State—

(I) consistent with clause (ii), ensures that, for each subject, the total number of students assessed in such subject using the alternate assessments does not exceed 1 percent of the total number of all students in the State who are assessed in such subject;

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[4] So in original. No subsec. (c)(4)(B)(vi) has been enacted.

(II) ensures that the parents of such students are clearly informed, as part of the process for developing the individualized education program (as defined in section 614(d)(1)(A) of the Individuals with Disabilities Education Act (20 U.S.C. 1414(d)(1)(A)))—

(aa) that their child's academic achievement will be measured based on such alternate standards; and

(bb) how participation in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma;

(III) promotes, consistent with the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), the involvement and progress of students with the most significant cognitive disabilities in the general education curriculum;

(IV) describes in the State plan the steps the State has taken to incorporate universal design for learning, to the extent feasible, in alternate assessments;

(V) describes in the State plan that general and special education teachers, and other appropriate staff—

(aa) know how to administer the alternate assessments; and

(bb) make appropriate use of accommodations for students with disabilities on all assessments required under this paragraph;

(VI) develops, disseminates information on, and promotes the use of appropriate accommodations to increase the number of students with significant cognitive disabilities—

(aa) participating in academic instruction and assessments for the grade level in which the student is enrolled; and

(bb) who are tested based on challenging State academic standards for the grade level in which the student is enrolled; and

(VII) does not preclude a student with the most significant cognitive disabilities who takes an alternate assessment based on alternate academic achievement standards from attempting to complete the requirements for a regular high school diploma.

(ii) Special rules

(I) Responsibility under IDEA

Subject to the authority and requirements for the individualized education program team for a child with a disability under section 614(d)(1)(A)(i)(VI)(bb) of the Individuals with Disabilities Education Act

(20 U.S.C. 1414(d)(1)(A)(i)(VI)(bb)), such team, consistent with the guidelines established by the State and required under section 612(a)(16)(C) of such Act (20 U.S.C. 1412(c)(16)(C))[5] and clause (i)(II) of this subparagraph, shall determine when a child with a significant cognitive disability shall participate in an alternate assessment aligned with the alternate academic achievement standards.

(II) Prohibition on local cap

Nothing in this subparagraph shall be construed to permit the Secretary or a State educational agency to impose on any local educational agency a cap on the percentage of students administered an alternate assessment under this subparagraph, except that a local educational agency exceeding the cap applied to the State under clause (i)(I) shall submit information to the State educational agency justifying the need to exceed such cap.

(III) State support

A State shall provide appropriate oversight, as determined by the State, of any local educational agency that is required to submit information to the State under subclause (II).

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[5] So in original. Probably should be "(20 U.S.C. 1412(a)(16(C))".

(IV) Waiver authority

This subparagraph shall be subject to the waiver authority under section 7861 of this title.

(E) State authority

If a State educational agency provides evidence, which is satisfactory to the Secretary, that neither the State educational agency nor any other State government official, agency, or entity has sufficient authority, under State law, to adopt challenging State academic standards, and academic assessments aligned with such standards, which will be applicable to all students enrolled in the State's public elementary schools and secondary schools, then the State educational agency may meet the requirements of this subsection by—

(i) adopting academic standards and academic assessments that meet the requirements of this subsection, on a statewide basis, and limiting their applicability to students served under this part; or

(ii) adopting and implementing policies that ensure that each local educational agency in the State that receives grants under this part will adopt academic content and student academic achievement standards, and academic assessments aligned with such standards, which—

(I) meet all of the criteria in this subsection and any regulations regarding such

standards and assessments that the Secretary may publish; and

(II) are applicable to all students served by each such local educational agency.

(F) Language assessments

(i) In general

Each State plan shall identify the languages other than English that are present to a significant extent in the participating student population of the State and indicate the languages for which annual student academic assessments are not available and are needed.

(ii) Secretarial assistance

The State shall make every effort to develop such assessments and may request assistance from the Secretary if linguistically accessible academic assessment measures are needed. Upon request, the Secretary shall assist with the identification of appropriate academic assessment measures in the needed languages, but shall not mandate a specific academic assessment or mode of instruction.

(G) Assessments of English language proficiency

(i) In general

Each State plan shall demonstrate that local educational agencies in the State will provide for an annual assessment of English proficiency of all English learners in the schools served by the State educational agency.

(ii) Alignment

The assessments described in clause (i) shall be aligned with the State's English language proficiency standards described in paragraph (1)(F).

(H) Locally-selected assessment

(i) In general

Nothing in this paragraph shall be construed to prohibit a local educational agency from administering a locally-selected assessment in lieu of the State-designed academic assessment under subclause (I)(bb) and subclause (II)(cc) of subparagraph (B)(v), if the local educational agency selects a nationally-recognized high school academic assessment that has been approved for use by the State as described in clause (iii) or (iv) of this subparagraph.

(ii) State technical criteria

To allow for State approval of nationally-recognized high school academic assessments that are available for local selection under clause (i), a State educational agency shall establish technical criteria to determine if any such assessment meets the requirements of clause (v).

(iii) State approval

If a State educational agency chooses to make a nationally-recognized high school assessment available for selection by a local educational agency under clause (i), which

has not already been approved under this clause, such State educational agency shall—

(I) conduct a review of the assessment to determine if such assessment meets or exceeds the technical criteria established by the State educational agency under clause (ii);

(II) submit evidence in accordance with subsection (a)(4) that demonstrates such assessment meets the requirements of clause (v); and

(III) after fulfilling the requirements of subclauses (I) and (II), approve such assessment for selection and use by any local educational agency that requests to use such assessment under clause (i).

(iv) Local educational agency option

(I) Local educational agency

If a local educational agency chooses to submit a nationally-recognized high school academic assessment to the State educational agency, subject to the approval process described in subclause (I) and subclause (II) of clause (iii) to determine if such assessment fulfills the requirements of clause (v), the State educational agency may approve the use of such assessment consistent with clause (i).

(II) State educational agency

Upon such approval, the State educational agency shall approve the use of such

assessment in any other local educational agency in the State that subsequently requests to use such assessment without repeating the process described in subclauses (I) and (II) of clause (iii).

(v) Requirements

To receive approval from the State educational agency under clause (iii), a locally-selected assessment shall—

(I) be aligned to the State's academic content standards under paragraph (1), address the depth and breadth of such standards, and be equivalent in its content coverage, difficulty, and quality to the State-designed assessments under this paragraph (and may be more rigorous in its content coverage and difficulty than such State-designed assessments);

(II) provide comparable, valid, and reliable data on academic achievement, as compared to the State-designed assessments, for all students and for each subgroup of students defined in subsection (c)(2), with results expressed in terms consistent with the State's academic achievement standards under paragraph (1), among all local educational agencies within the State;

(III) meet the requirements for the assessments under subparagraph (B) of this paragraph, including technical crite-

ria, except the requirement under clause (i) of such subparagraph; and

(IV) provide unbiased, rational, and consistent differentiation between schools within the State to meet the requirements of subsection (c).

(vi) Parental notification

A local educational agency shall notify the parents of high school students served by the local educational agency—

(I) of its request to the State educational agency for approval to administer a locally-selected assessment; and

(II) upon approval, and at the beginning of each subsequent school year during which the locally selected assessment will be administered, that the local educational agency will be administering a different assessment than the State-designed assessments under subclause (I)(bb) and subclause (II)(cc) of subparagraph (B)(v).

(I) Deferral

A State may defer the commencement, or suspend the administration, but not cease the development, of the assessments described in this paragraph, for 1 year for each year for which the amount appropriated for grants under part B is less than $369,100,000.

(J) Adaptive assessments

(i) In general

Subject to clause (ii), a State retains the right to develop and administer computer adaptive assessments as the assessments described in this paragraph, provided the computer adaptive assessments meet the requirements of this paragraph, except that—

(I) subparagraph (B)(i) shall not be interpreted to require that all students taking the computer adaptive assessment be administered the same assessment items; and

(II) such assessment—

(aa) shall measure, at a minimum, each student's academic proficiency based on the challenging State academic standards for the student's grade level and growth toward such standards; and

(bb) may measure the student's level of academic proficiency and growth using items above or below the student's grade level, including for use as part of a State's accountability system under subsection (c).

(ii) Students with the most significant cognitive disabilities and English learners

In developing and administering computer adaptive assessments—

(I) as the assessments allowed under subparagraph (D), a State shall ensure that such computer adaptive assessments—

(aa) meet the requirements of this paragraph, including subparagraph (D), except such assessments shall not be required to meet the requirements of clause (i)(II); and

(bb) assess the student's academic achievement to measure, in the subject being assessed, whether the student is performing at the student's grade level; and

(II) as the assessments required under subparagraph (G), a State shall ensure that such computer adaptive assessments—

(aa) meet the requirements of this paragraph, including subparagraph (G), except such assessment shall not be required to meet the requirements of clause (i)(II); and

(bb) assess the student's language proficiency, which may include growth towards such proficiency, in order to measure the student's acquisition of English.

(K) Rule of construction on parent rights

Nothing in this paragraph shall be construed as preempting a State or local law regarding the decision of a parent to not have the parent's child

participate in the academic assessments under this paragraph.

(L) Limitation on assessment time

Subject to Federal or State requirements related to assessments, evaluations, and accommodations, each State may, at the sole discretion of such State, set a target limit on the aggregate amount of time devoted to the administration of assessments for each grade, expressed as a percentage of annual instructional hours.

(3) Exception for recently arrived English learners

(A) Assessments

With respect to recently arrived English learners who have been enrolled in a school in one of the 50 States in the United States or the District of Columbia for less than 12 months, a State may choose to—

(i) exclude—

(I) such an English learner from one administration of the reading or language arts assessment required under paragraph (2); and

(II) such an English learner's results on any of the assessments required under paragraph (2)(B)(v)(I) or (2)(G) for the first year of the English learner's enrollment in such a school for the purposes of the State-determined accountability system under subsection (c); or

(ii)(I) assess, and report the performance of, such an English learner on the reading or language arts and mathematics assessments required under paragraph (2)(B)(v)(I) in each year of the student's enrollment in such a school; and

(II) for the purposes of the State-determined accountability system—

(aa) for the first year of the student's enrollment in such a school, exclude the results on the assessments described in subclause (I);

(bb) include a measure of student growth on the assessments described in subclause (I) in the second year of the student's enrollment in such a school; and

(cc) include proficiency on the assessments described in subclause (I) in the third year of the student's enrollment in such a school, and each succeeding year of such enrollment.

(B) English learner subgroup

With respect to a student previously identified as an English learner and for not more than 4 years after the student ceases to be identified as an English learner, a State may include the results of the student's assessments under paragraph (2)(B)(v)(I) within the English learner subgroup of the subgroups of students (as defined in subsection (c)(2)(D)) for the purposes of the State-determined accountability system.

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8. 34 C.F.R. 200.1 provides in pertinent part:

State responsibilities for developing challenging academic standards.

(a) *Academic standards in general.* A State must develop challenging academic content and student academic achievement standards that will be used by the State, its local educational agencies (LEAs), and its schools to carry out subpart A of this part. These academic standards must—

(1) Be the same academic content and academic achievement standards that the State applies to all public schools and public school students in the State, including the public schools and public school students served under subpart A of this part, except as provided in paragraphs (d) and (e) of this section, which apply only to the State's academic achievement standards;

(2) Include the same knowledge and skills expected of all students and the same levels of achievement expected of all students, except as provided in paragraphs (d) and (e) of this section; and

(3) Include at least mathematics, reading/language arts, and, beginning in the 2005-2006 school year, science, and may include other subjects determined by the State.

(b) *Academic content standards.* (1) The challenging academic content standards required under paragraph (a) of this section must—

(i) Specify what all students are expected to know and be able to do;

(ii) Contain coherent and rigorous content; and

(iii) Encourage the teaching of advanced skills.

(2) A State's academic content standards may—

(i) Be grade specific; or,

(ii) Cover more than one grade if grade-level content expectations are provided for each of grades 3 through 8.

(3) At the high school level, the academic content standards must define the knowledge and skills that all high school students are expected to know and be able to do in at least reading/language arts, mathematics, and, beginning in the 2005-06 school year, science, irrespective of course titles or years completed.

(c) *Academic achievement standards.* (1) The challenging student academic achievement standards required under paragraph (a) of this section must—

(i) Be aligned with the State's academic content standards; and

(ii) Include the following components for each content area:

(A) Achievement levels that describe at least—

(1) Two levels of high achievement—proficient and advanced—that determine how well students are mastering the material in the State's academic content standards; and

(2) A third level of achievement—basic—to provide complete information about the progress of lower-

achieving students toward mastering the proficient and advanced levels of achievement.

(B) Descriptions of the competencies associated with each achievement level.

(C) Assessment scores ("cut scores") that differentiate among the achievement levels as specified in paragraph (c)(1)(ii)(A) of this section, and a description of the rationale and procedures used to determine each achievement level.

(2) A State must develop academic achievement standards for every grade and subject assessed, even if the State's academic content standards cover more than one grade.

(3) With respect to academic achievement standards in science, a State must develop—

(i) Achievement levels and descriptions no later than the 2005-06 school year; and

(ii) Assessment scores ("cut scores") after the State has developed its science assessments but no later than the 2007-08 school year.

(d) *Alternate academic achievement standards.* For students under section 602(3) of the Individuals with Disabilities Education Act with the most significant cognitive disabilities who take an alternate assessment, a State may, through a documented and validated standards-setting process, define alternate academic achievement standards, provided those standards—

(1) Are aligned with the State's academic content standards;

(2) Promote access to the general curriculum; and

(3) Reflect professional judgment of the highest achievement standards possible.

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9. 34 C.F.R. 300.39 provides:

Special education.

(a) *General.* (1) *Special education* means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—

(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(ii) Instruction in physical education.

(2) *Special education* includes each of the following, if the services otherwise meet the requirements of paragraph (a)(1) of this section—

(i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;

(ii) Travel training; and

(iii) Vocational education.

(b) *Individual special education terms defined.* The terms in this definition are defined as follows:

(1) *At no cost* means that all specially-designed instruction is provided without charge, but does not

preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.

(2) *Physical education* means—

(i) The development of—

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports); and

(ii) Includes special physical education, adapted physical education, movement education, and motor development.

(3) *Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

(i) To address the unique needs of the child that result from the child's disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

(4) *Travel training* means providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to—

(i) Develop an awareness of the environment in which they live; and

(ii) Learn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community).

(5) *Vocational education* means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree.

RECORD AND BRIEFS

SUPREME COURT, U.S.
FILED
DEC 21 2016

No. 15-827

In the Supreme Court of the United States

ENDREW F., A MINOR,
BY AND THROUGH HIS PARENTS AND NEXT
FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AASA, THE SCHOOL SUPERINTENDENTS ASSOCIATION; CASE, THE COUNCIL OF ADMINISTRATORS OF SPECIAL EDUCATION; THE ASSOCIATION OF SCHOOL BUSINESS OFFICIALS INTERNATIONAL; AND FIVE OTHER EDUCATIONAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Christopher P. Borreca
THOMPSON & HORTON LLP
3200 Southwest Freeway
Suite 2000
Houston, Texas 77027
(713) 554-6740

Ruthanne M. Deutsch
Counsel of Record
Hyland Hunt
Anne J. Jang
DEUTSCH HUNT PLLC
300 New Jersey Ave., NW
Suite 900
Washington, DC 20001
(202) 868-6915
rdeutsch@deutschhunt.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*?

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INTEREST OF *AMICI CURIAE*[1]

Amici have a keen interest in this case because state and local education agencies bear "[t]he primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). *Amici* represent local educational officials who serve on the front line of providing education services to all children attending public schools, including the nearly 7 million children with disabilities who account for between three and nine percent of total enrollment, depending on age.[2]

AASA, The School Superintendents Association (AASA), founded in 1865, is the professional organization for some 10,000 educational leaders in the United States and throughout the world. AASA members range from chief executive officers, superintendents and senior level school administrators to cabinet members, professors and aspiring school

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[1] This brief is filed with the written consent of all parties through universal letters of consent on file with the Clerk. No counsel for either party authored this brief in whole or in part, and no person or entity other than the *amici*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

[2] U.S. DEP'T OF EDUC., 38TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 2016, 250 ("ANNUAL REPORT"), http://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/38th-arc-for-idea.pdf. For children under age 3, 2.9% of students receive federal funding; for children ages 3-5, Part B funding accounted for 6.1% of total students in 2012; for children ages 6–21, the percentage was 8.7% in 2014. *Id.* at xxiii–xxiv.

system leaders. Throughout its more than 150 years, AASA has advocated for the highest quality public education for all students, and provided programing to develop and support school system leaders. AASA members advance the goals of public education and champion children's causes in their districts and nationwide.

CASE, the Council of Administrators of Special Education, is an international non-profit professional organization providing leadership and support to approximately 4200 members who are dedicated to enhancing the worth, dignity, potential, and uniqueness of students with disabilities. Its mission is to provide leadership and support to members by shaping policies and practices that impact the quality of education. The membership is comprised primarily of local school district administrators of special education programs. CASE is a division of the Council for Exceptional Children (CEC), which is the largest professional organization representing teachers, administrators, parents, and others concerned with the education of children with disabilities.

The Association of School Business Officials International (ASBO), founded in 1910, is an educational association that supports school business professionals who are dedicated and trustworthy stewards of taxpayers' investment in public education. Through its members and affiliates, ASBO International represents approximately 30,000 school business officials who manage educational resources effectively and efficiently to support student achievement.

The National Association of Elementary School Principals (NAESP) is a professional organization serving elementary and middle school principals and other education leaders throughout the United States, Canada, and overseas. The Association believes that the progress and well-being of the individual child must be at the forefront of all elementary and middle school planning and operations. As the representative of the nation's school leaders serving more than 33 million children in grades pre-kindergarten through 8, the Association serves as a leading advocate for children and youth, ensuring every student has access to educational opportunities, and promoting education as a matter of national priority.

The National Association of Secondary School Principals (NASSP) is the leading organization of and voice for middle and high school principals, assistant principals, and school leaders from across the United States and in over 35 countries around the world. Founded in 1916, NASSP's mission is to connect and engage school leaders through advocacy, research, education, and student programs.

The Association of Educational Service Agencies (AESA) is a professional organization serving over 500 regional educational service agencies (ESAs) in 45 states throughout the nation. AESA members reach over 80% of public school districts, over 83% of private schools, over 80% of certified teachers, more than 80% of non-certified school employees, and well over 80% of public and private school students. ESAs provide support services such as professional development, itinerant employees, technology support,

transportation support, and leadership development to their member districts.

The National Association of Federally Impacted Schools (NAFIS), established in 1973, is a nonprofit membership association that represents public school districts across the country that receive federal Impact Aid funding. NAFIS members are geographically and demographically diverse school districts—many educate a significant population of Native American and military-connected students. NAFIS advocates for, and offers professional development to, the administrators and school board members of federally-impacted school districts.

The National Rural Education Association (NREA) is the leading national organization providing advocacy to enhance educational opportunities for rural schools and their communities. NREA's mission is to provide a unified national voice to address the needs and concerns of rural education and communities. NREA believes that all citizens are entitled to the same quality education regardless of socio-economic background or geographic location.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici can attest that the country's educators are already aiming high. Such aspirations, shared by educations and parents alike, should not be conflated with the separate question of how courts should assess whether a free and appropriate public education has been provided, which turns on the role generalist judges should play in settling disputes about the

likelihood of success of an individualized education program built on complex methodological choices.

In *Rowley*, this Court already determined that a free and appropriate public education (FAPE) is offered when the education program "confer[s] some educational benefit." 458 U.S. at 200. Since then, Congress has amended the IDEA various times, and twice enacted major legislation reauthorizing and modifying the Act.[3] Yet it has left the definition of FAPE essentially unchanged.

Not only has Congress acquiesced in the *Rowley* standard through repeatedly declining to amend the FAPE definition, the 2004 standards that Congress enacted to guide determinations in administrative hearings, 20 U.S.C. § 1415(f)(3)(E), codified case law applying *Rowley* and reinforced the "some benefit" standard. Particularly because the IDEA is Spending Clause legislation where States must be on clear notice of the conditions attached to federal funding—funding which covers only a paltry portion of the cost of special education—courts should not engraft a new substantive standard.

Jettisoning *Rowley*'s "some benefit" standard will also be unworkable and counter-productive. There has not been, and will not be, a race to the bottom applying *Rowley*. Under the current framework, educators focus on working collaboratively with parents to craft a

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[3] *See* Individuals with Disabilities Education Improvement Act of 2004 (2004 IDEA Amendments), Pub. L. No. 108-446, 118 Stat. 2647; Individuals with Disabilities Education Act Amendments of 1997 (1997 IDEA Amendments), Pub. L. No. 105-17, 111 Stat. 37; *see generally* Pet. Br. 6–8.

uniquely-tailored "individualized education program" (IEP) in accordance with rigorous process-based standards set forth by Congress. These IEP procedures, now even more demanding and substantive than when *Rowley* was decided, ensure that educators set high goals for students with disabilities.

Under the governing standard, courts can readily check whether an IEP has been properly crafted in accordance with the detailed statutory criteria. Not so for a new and imprecise heightened standard created from whole cloth. As *Rowley* recognized and Congress later reinforced in § 1415(f)(3)(E), it is unworkable to have generalist hearing officers and judges who are untrained in educational methodologies second-guess the judgments of educational experts working daily with the student that the IEP is designed to support. Instead, the rational basis-type review adopted in *Rowley* and endorsed by Congress appropriately asks courts to assess only whether an IEP was reasonably calculated to enable the child to receive some educational benefit.

Imposing a heightened standard will not only require second-guessing by ill-equipped courts and measurement against markers that Congress never set, it will redirect resources from providing education services to fighting court battles. The irony, therefore, is that the "substantially equal opportunity" standard advocated for by Petitioner, but tellingly not the United States, will likely make things more unequal, by spurring litigation and favoring families with more resources that can better afford to litigate.

Ultimately, there is no warrant to reinvent the FAPE requirement. The IDEA, and the intertwined

substantive standards from other educational statutes that it incorporates, have never been more successful at delivering special education services and improving the performance of students with disabilities. Educators are already aiming high, courts are playing the role that Congress contemplated, the *Rowley* standard is working, and the judgment below should be affirmed.

ARGUMENT

I. UNDER IDEA'S MODEL OF COOPERATIVE FEDERALISM, ONLY CONGRESS CAN REDEFINE FAPE, AND CONGRESS HAS EMBRACED *ROWLEY*.

A. Because IDEA Is a Spending Clause Statute, Congress Must Speak Clearly to Impose New Obligations on the States.

The essential starting point for construing the IDEA, a Spending Clause statute, is that any conditions upon the receipt of federal funds must be set out "unambiguously." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). When Congress acts under its spending power, it generates legislation "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

It defies credulity to think that the meaning of FAPE, a concept that permeates the statute and forms the core of "the educational programs IDEA directs school districts to provide," *Arlington*, 548 U.S. at 305 (Ginsburg, J., concurring), could be reinvented without express proclamation by Congress and agreement by

the States. Provision of FAPE is the single-most litigated aspect of the Act.[4] Congress could not and would not *sub silentio* change the rules of the game about this core concept.[5]

Sticking to the terms of the statutory bargain is all the more essential here because the federal government is not, and was never meant to be, an equal partner under the IDEA. Congress originally called for a federal contribution of 40% of the estimated additional costs of providing education services to students with disabilities. *See* Pub. L. No. 94-142, 89 Stat. 773; § 1401(a)(B)(v). But the federal government has yet to meet that already-less-than-equal goal and consistently contributes less than half of their authorized share through annual appropriations, resulting in a federal shortfall that has only increased over time.

In fiscal year 2014, IDEA federal funding covered a mere 16 percent of the estimated excess cost of educating children with disabilities; the roughly $18

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[4] *See* Perry A. Zirkel, *Have the Amendments to the Individuals with Disabilities Education Act Razed Rowley and Raised the Substantive Standard for "Free Appropriate Public Education,"* 28 J. OF NAT'L ASS'N OF ADMIN. L. JUDICIARY 397, 402 n.17 (2008).

[5] The centrality of FAPE to the statute is thus distinguishable from "lower key" provisions that members of this Court have questioned should be subject to the *Pennhurst* "clear notice" rule. *See, e.g., Arlington*, 548 U.S. at 305 (expert fee issue was "lower key" because it "concern[ed] not the educational programs IDEA directs school districts to provide, but 'the remedies available against a noncomplying [district].'") (Ginsburg, J. concurring in part and concurring in the judgment) (quoting *id.* at 317, Breyer, J., dissenting).

billion shortfall has been assumed by the States and local school districts.[6] Since 2009, the average federal share per child has remained stagnant, while average per pupil expenditure has risen about 1 percent per year. The result: a steadily declining federal contribution to the costs of educating students with special needs.[7] And since 1981, the only year that the federal contribution has ever reached the 40% statutory goal, the federal share has been less than half of the federal commitment.[8]

The IDEA is said to be a "model of cooperative federalism," *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 52 (2005). But it is hardly "cooperative" to unilaterally—and silently—impose a heightened FAPE standard upon the States, particularly when the federal government has proved unable to uphold its end of the funding bargain. The States never received the requisite clear notice (or any notice) of either of the newly-minted standards proposed by Petitioner or the United States. The proposed standards are at odds

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[6] IDEA Part B "full funding" for FY 2014 would have amounted to approximately $28.65 billion, about $17.17 billion more than was appropriated. *See* Clare McCann, *IDEA Funding*, EDCENTRAL, http://www.edcentral.org/edcyclopedia/individuals-with-disabilities-education-act-funding-distribution/.

[7] COMMITTEE FOR EDUCATION FUNDING, EDUCATION MATTERS: INVESTING IN AMERICA'S FUTURE 149, http://cef.org/wp-content/uploads/2015/03/2015FullBudgetBook-March-31.pdf.

[8] *Id.*; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-2, SPECIAL EDUCATION: MORE FLEXIBLE SPENDING REQUIREMENT COULD MITIGATE UNINTENDED CONSEQUENCES WHILE PROTECTING SERVICES 7 (2015).

with each other, unmoored from the statutory text, and have yet to be considered, much less adopted, by any appellate court. Only Congress can so rewrite the bargain struck under the IDEA, thereby affording States the choice to accept or decline any new terms.

B. *Rowley*'s "Some Benefit" Test Remains Good Law, and Was Endorsed by Congress in 2004 in Section 1415(f)(3)(E).

1. In *Rowley*, a case "present[ing] a question of statutory interpretation," 458 U.S. at 179, this Court grappled with the meaning of "free appropriate public education," the "principal substantive phrase used in the Act." 458 U.S. at 187. *Rowley*'s core holding, independent of its facts, was that a "free and appropriate public education" occurs "by providing [at public expense] personalized instruction [that comports with the IEP process] with sufficient support services to permit the child to benefit educationally from instruction." *Id.* at 203-204. The Court expressly declined to establish "any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* at 202. Instead, the Court held that any inquiry into the provision of FAPE should be twofold: 1) whether the school district complied with IEP procedures; and 2) whether the IEP "developed through the Act's procedures [was] reasonably calculated to enable the child to receive educational benefits." *Id.* at 206-207.

Despite the many changes to the IDEA since *Rowley* was decided in 1982, it is undisputed that Congress left the core definition of FAPE intact. *Compare* 20 U.S.C. § 1401(9), *with* Pub. L. No. 94-142, § 602(18), 89 Stat.

773, 775. And although the Act now reflects heightened aspirations and includes more accountability mechanisms, it remains the case today, as in 1982, that "[n]oticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded to handicapped children." *Rowley*, 458 U.S. at 190. Equally true today, as well, is that there are "infinite variations" in the degree of educational "benefits obtainable by children" given the "wide spectrum" of varying needs that are eligible for services under the Act. *Id.* at 202.

2. *Stare decisis* arguments, *see* Resp. Br. 22-24, thus apply with special force, as Congress has left the key definition of FAPE unchanged despite repeated opportunities for revision. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it enacts that statute without change." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-240 (2009). And Congress has never amended the FAPE definition in response to *Rowley*, even as Congress has shown itself well-able to amend the IDEA when it wants to respond to this Court's rulings. *See* 20 U.S.C. § 1403 (providing a clear waiver of sovereign immunity after *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989), which held that Congress's intent in abrogating a State's immunity under a previous version of the Act was not sufficiently clear). *See also Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2409-2410 (2015) (recognizing the strength of *stare decisis* in statutory rulings, especially when there is "long congressional acquiescence" in the holding at issue). This Court should reject arguments to either reinvent *Rowley*, rewrite the statute, or both.

Both Petitioner and the United States disclaim any intent to overrule *Rowley*, yet Petitioner's standard is indistinguishable from one that *Rowley* rejected,[9] while the United States reinterprets *Rowley* beyond recognition, parsing the case as if it were a statute, and eliding the critical statutory text. The definition of FAPE, and the absence of any prescribed substantive standard for children receiving federal funds under the Act, remain unchanged. *Rowley*'s holding turned on these core statutory characteristics and there is no warrant for jettisoning the "some benefit" rule.

3. Congressional support for the *Rowley* rule is manifest by more than mere acquiescence. In 2004, Congress added Section 1415(f)(3)(E) to the Act.[10] Meant to guide the hearing officers that conduct the first round of due process hearings,[11] the chosen language echoes and reinforces *Rowley*'s "some benefit" standard. The initial subsection provides that a determination of whether a child has received FAPE should be made on "substantive grounds." 20 U.S.C. § 1415(f)(3)(E)(i). Congress declined to specify any quantum of substantive attainment or requisite degree of progress. This is fully consistent with *Rowley*'s "some benefit" standard, as "some," in this context, means "being of an unspecified amount."[12]

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[9] *Rowley* expressly rejected a "commensurate opportunity" standard, 458 U.S. at 189–190. *See also* Resp. Br. 17–19.

[10] The complete provision is set forth in the appendix.

[11] *See* 20 U.S.C. §§ 1415(b)(6), 1415(f)(1), 1415(i)(2)(A), 1415(g).

[12] *See Merriam-Webster's Collegiate Dictionary* (11th ed. 2003).

In the second subsection, Congress reinforced core procedural protections, like the right of parents to participate in the decision-making process, providing that failure to comply would result in an automatic denial of FAPE, 20 U.S.C. § 1415(f)(3)(E)(ii)(II). But for other procedural errors, Congress again echoed *Rowley*, stating that FAPE is denied when a "deprivation of educational benefit" results. *Id.* § 1415(f)(3)(E)(ii)(III). This provision codified extant case law applying *Rowley* and developing a harmless error standard. *See, e.g., Burilovich v. Bd. of Educ.*, 208 F.3d 560, 565-566 (6th Cir. 2000) (applying *Rowley* "some benefit" rule, employing harmless error standard like § 1415(f)(3)(E) and collecting cases from other circuits); *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001); *Houston ISD v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000).

Nor is Petitioner's suggestion (Br. 34) that Section 1415(f)(3)(E) heightened the reviewing standard supported by the legislative history. The Senate Report clarifies that the "substantive grounds" requirement aimed to make review *less* intrusive, by avoiding denials of FAPE based on "a mere procedural technicality." S. Rep. 108-185 (2003) at 40.

In contrast to this explicit congressional endorsement of the *Rowley* standard in § 1415(f)(3)(E), there is no similar textual anchor for the standard proposed by Petitioner. Hortatory language in the statutory findings cannot supplant the unchanged FAPE definition, or the guideposts echoing *Rowley* in § 1415(f)(3)(E), particularly in the Spending Clause context where conditions must be stated clearly. *See Pennhurst*, 451 U.S. at 24 (concluding that statutory

finding provisions "were intended to be hortatory, not mandatory"). And the fact that the United States and Petitioner cannot agree on the proper standard is yet further proof that neither the "substantially equal opportunity" standard that Petitioner proposes, nor the "significant educational progress" standard urged by the United States, is mandated by the statute's text.

In sum, Congress has not authorized—and the States have not agreed—for courts to play any more intrusive a role in determining whether FAPE has been provided than already articulated in *Rowley*: is there a "basic floor of opportunity" that is reasonably calculated to yield "some educational benefit." 458 U.S. at 200.

II. THE IEP PROCESS AND OTHER FEDERAL STATUTES ALREADY ENSURE THAT SCHOOL DISTRICTS AIM HIGH; ASKING JUDGES TO SECOND-GUESS EDUCATORS' INFORMED DECISIONS WILL ONLY INCREASE LITIGATION AND INEQUALITY.

Suggestions by Petitioner, the United States, and some supporting *amici* that the *Rowley* standard condones a race to the bottom are baseless. As Justice Stevens recognized in his concurrence in *Schaffer*, "[w]e should presume that public school officials are properly performing their difficult responsibilities under this important statute." 546 U.S. at 62-63. Petitioner's assertion that maintaining the *Rowley* standard will encourage educators to "aim[] for educational achievement that barely exceeds the trivial" (Br. 17) wrongly conflates the inquiry that courts must undertake to determine whether a child has received

FAPE with the separate and distinct question of how school districts pursue statutory goals through compliance with the detailed procedures set forth in the Act.

Judicial deference to complex methodological choices does not encourage educators to aim low, it empowers them to aim high. *Rowley*'s non-intrusive standard allows multidisciplinary teams to craft the best options for the child at hand, without risk of being second-guessed by a hearing officer or judge who lacks the expertise to assess the comparative worth of different educational approaches. In fact, the IDEA makes clear, through rigorous procedural requirements, that school districts *must* aim high in assessing the needs of children with disabilities and in providing personalized special education services.

The notion that school districts commonly reject methods and approaches that could be helpful to a child under the guise that they are already "doing enough" not only presumes, without foundation, the worst about educators, it completely ignores the accountability measures emphasized in and enforced by the IDEA, and interwoven statutes like the Elementary and Secondary Education Act (ESEA). *See* Resp. Br. 7. The IDEA's distinct emphasis on stringent *process-based* protections ensures that individualized programs are "tailored to the unique needs" of each child, *Rowley*, 452 U.S. at 181, and seek "ambitious but achievable" educational benefits.[13]

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[13] U.S. Dep't of Educ., Dear Colleague Letter at 5 (Nov. 16, 2015), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf.

Congress's consistent refusal to set any specific substantive marker against which FAPE should be measured confirms that compliance with congressionally-mandated processes and accountability mechanisms should, per *Rowley*, be the focus of judicial review. *See* § 1415(f)(3)(E)(ii). Extra-statutory and nebulous concepts of "substantial educational benefit" (as the petition for certiorari advocates), or "substantially equal opportunity" (as Petitioner now argues), or "significant educational progress" (urged by the United States) are all standards that courts are ill-equipped to evaluate or measure, and which, ultimately, will engender more litigation and more inequality, without necessarily improving educational outcomes.

A. The IEP Process Is Laden with Substantive Benchmarks and Ensures that Educators Aim High.

1. An Individualized Education Program, or IEP, forms the nucleus of the IDEA's guarantee of FAPE for children with disabilities. *See* 20 U.S.C. § 1401(9); § 1414(d)(1)(A). An IEP is "the centerpiece of the statute's education delivery system," *Honig v. Doe*, 484 U.S. 305, 311-312 (1988), and is the "modus operandi" of the Act, *Sch. Committee of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368 (1985).

An IEP is produced through an intensive collaborative effort by families and schools to assess and address a child's unique learning issues. *See* 20 U.S.C. § 1414(d). The IDEA prescribes "elaborate and highly specific procedural safeguards," *Rowley*, 458 U.S. at 205, that educators must follow in developing

an IEP—including measures directed at the substantive quality of the resulting plan. As Petitioner and the United States recognize, the rigors of the IEP process have only increased since *Rowley*. Pet. Br. 36-40; U.S. Br. 21.

For example, the IEP must articulate "measurable annual goals . . . designed to . . . enable the child to be involved in and make progress in the general educational curriculum." 20 U.S.C. § 1414(d)(1)(A)(i)(II). The IEP must specify the special services to be provided to permit the child "to advance appropriately toward attaining the annual goals." *Id.* § 1414(d)(1)(A)(i)(IV).

Moreover, the programs, curricula, and services that schools offer each child must be based on "peer-reviewed research to the extent practicable." 20 U.S.C. § 1414(d)(1)(A)(i)(IV); *see also id.* § 1400(c)(5)(E) (endorsing the use of "scientifically based instructional practices, to the maximum extent practicable"). Parents—integral members of the "IEP Team" that develops, reviews, and revises the program for a child, 20 U.S.C. § 1414(d)(1)(B)—can accept or reject the school's suggested educational practices from being incorporated into an IEP. The goal of the multidisciplinary IEP team is to ensure the greatest likelihood of success given the unique circumstances of each child.

The IDEA builds in other procedural mechanisms to confirm that the IEP is substantively sound and workable in practice. The child's progress is carefully monitored through periodic reports from the school district, 20 U.S.C. § 1414(d)(1)(A)(i)(III), and the IEP must be reviewed and, where necessary, revised at

least once a year to ensure that annual goals are being achieved, § 1414(d)(4)(A). And in the event a parent files a due process complaint, the statute and implementing regulations require the school district to convene a resolution meeting to try to solve problems without litigation. 20 U.S.C. § 1415(f)(1)(B)(i); 34 C.F.R. § 300.510(a).

These measures do much more than set forth meaningless procedural niceties. Rather, they work in concert to ensure that the IEP is substantively appropriate and "individually designed to provide educational benefit" to the child. *Rowley*, 458 U.S. at 201. Far from indicating that the *Rowley* "some benefit" standard is too low, these increased procedural protections and accountability measures reinforce *Rowley*'s central conclusion that compliance with the IEP process, itself, usually is enough to attain the desired substantive benefit. 458 U.S. at 206.

2. The IEP process, moreover—and the IDEA as a whole—does not operate within a vacuum. Congress has also legislated outside the IDEA to encourage States to adopt high standards for special education students. There is thus even less warrant to impose extra-statutory substantive requirements. As Petitioner points out at length (Br. 26–28), the IDEA works in conjunction with the Elementary and Secondary Education Act (ESEA), which requires States to adopt "challenging academic content standards and aligned academic achievement standards" for "all students," including those with disabilities. 20 U.S.C. §§ 6311(b)(1)(A)–(B), 6311(b)(2)(B)(vii)(I). While the ESEA permits the use of "alternate academic achievement standards for

students with the most significant cognitive difficulties," *id.* § 6311(b)(1)(E), even these are subject to the ESEA's "challenging State academic content standards," *id.* § 6311(b)(1)(E)(i)(I), and "must reflect professional judgment as to the highest possible standards achievable by" such students, *id.* § 6311(b)(1)(E)(i)(III). School districts are also subject to statewide accountability systems, which must consider the performance of students with disabilities compared to that of their non-disabled peers and require schools to address consistent underperformance of students with disabilities. *Id.* § 6311(c)(2)(C) (identifying children with disabilities as a "subgroup of students" for accountability purposes); *id.* § 6311(d)(2)(A)–(C) (requiring "targeted support and improvement" for schools in which "any subgroup of students is consistently underperforming"). *See also Resp.* Br. 6-7 (describing "systemic conditions" that States must satisfy to receive federal funding for education)

To maintain conformity with the IDEA and ESEA, then, educators simply cannot—contrary to Petitioner's suggestions—aim to barely clear the bar by seeking minimal benefit and limited progress for students with disabilities. Instead, the IEP process itself, bolstered by the ambitious goals and accountability mandated by the ESEA, purposefully bakes in rigorous and thoughtful consideration of each child's needs and holds school districts accountable for each child's progress. These mandates ensure that school districts and parents "aim high" while crafting the IEP, with clear goals tethered to state standards in place, but at the same time preserve the flexibility of educators to

make informed judgments about how best to help each student to succeed.

B. The *Rowley* Standard Properly Envisions a Judicial Check on Substantive Adequacy that Is Akin to Rational Basis Review.

1. The significant procedural requirements imposed by the IDEA naturally and intentionally spur the generation of meaningfully substantive education programs. *Rowley* is premised on "the importance Congress attached to these procedural safeguards," 458 U.S. at 205, and recognizes that any further evaluation of an IEP's substantive adequacy is properly limited to a rational basis-style review of assessing whether, on the whole, the program was "reasonably calculated to enable the child to receive educational benefits." *Id.* at 206–207. And as the cases detailed in Part III, *infra*, demonstrate, this standard is far from toothless.

Given the inter-circuit muddle regarding the proper formulation of the *Rowley* standard, *see* Pet. App. 17a-18a & n.8, this Court can clarify that *Rowley*'s "reasonably calculated to achieve some educational benefit" standard is a non-intrusive rational-basis-type check, already blessed by Congress in the criteria for hearing officers' decisions, not a newly-minted test that would disrupt the entire statutory scheme.[14]

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[14] Harping on the specific "merely more than de minimis" phrasing used sometimes by the Tenth Circuit elevates form over substance. *See e.g.*, *O.S. v. Fairfax County Sch. Bd.*, 804 F.3d 354, 358-359 (4th Cir. 2015) ("[W]e have never held 'some' educational benefit means only 'some minimal academic advancement, no matter how trivial.'").

Rowley's "reasonably calculated" language resembles the rational basis test used in other contexts where courts have recognized the impropriety of second-guessing substantive policy judgments that are better made by others. *See Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2033 (2012) (statute passes rational basis inspection when "reasonably related" to interests being served) (internal quotations and citations omitted). This non-intrusive inquiry makes sense because, like the legislative process, the development of an IEP can be messy and complex, often involving nuanced educational choices and compromises in service of attaining sometimes conflicting objectives that are exceedingly difficult for a court to appraise post hoc. There is no magical "right answer" for any given child or situation, no sure-fire methodology for teaching every child to read or do math or learn self-control. The *Rowley* standard lets generalist judges steer clear of making difficult choices between equally viable educational alternatives, while providing a substantive check that ensures educational benefit. *See* Part III, *infra*.

2. The U.S. Department of Education's What Works Clearinghouse—which "reviews the existing research on different programs, products, practices, and policies in education" to "provide educators with the information they need to make evidence-based decisions"—lists dozens of different instructional methodologies that "work" for various skills and learning problems. WWC: FIND WHAT WORKS! http://ies.ed.gov/ncee/Wwc/ (last visited Dec. 17, 2016). For literacy alone, the Clearinghouse catalogs 69 possible methodological interventions (all supported by "high-quality research") using a wide array of

intervention tools, including computer software, group instruction, and peer tutoring. *Id.*

Even established "best practices" do not guarantee the same results for each child, and are not uniformly carried out with the same fidelity for every student in every system, often due to factors outside a school's control, such as home environment or family situation. *Cf.* U.S. Dep't of Educ., Dear Colleague Letter at 6 ("[B]ecause the ways in which a child's disability affects his or her involvement and progress in the general education curriculum are highly individualized and fact-specific, the instruction and supports that may enable one child to achieve at grade-level may not necessarily be appropriate for another child with the same disability.") Each student's unique cognitive profile and learner characteristics, in other words, must be accounted for, and all while schools are obligated to meet many different learning standards, not focus only on a few isolated skills.

Autism spectrum disorder, to take one example, manifests itself in myriad presentations (*e.g.*, social communication impairments, atypical body movements, sensory challenges, behavioral problems, etc.), with symptoms that may change over time. *See* NAT'L AUTISM CTR., EVIDENCE-BASED PRACTICE AND AUTISM IN THE SCHOOLS: AN EDUCATOR'S GUIDE TO PROVIDING APPROPRIATE INTERVENTIONS TO STUDENTS WITH AUTISM SPECTRUM DISORDER 20–23 (2d ed. 2015).

Unsurprisingly, there are *many* research-based interventions that are appropriate to utilize with students with autism, from behavioral interventions to modeling to pivotal response training. *See id.* at 32–64 (summarizing fourteen different "established" evidence-

based interventions and identifying eighteen additional "emerging" interventions). Selecting and implementing the most appropriate interventions for a single child struggling with particular issues requires, among other things, careful consideration of that child's specific needs and history, ample understanding of each method and awareness of new research and findings, and ongoing "data collection" about what measures actually lead to student improvement. *See id.* at 66–94 (providing guidance on the selection, implementation, and assessment of interventions).

Professional judgment and experience are vital to such decisionmaking. Educators use their expertise, together with active input from parents—working against the statutorily-mandated IEP benchmarks—to make the best choices they can at the time to craft a specialized program that will most effectively address the unique needs of the student. School teams are best positioned to make recommendations for a student given that student's individual needs and learning profile, based on the team's expertise and experience of what has worked for their students and in their schools in the past. *Amici*'s members have seen countless instances where parents with initial misgivings about the school team's methodological choices end up more than satisfied with the results. These success stories, however, do not get litigated.

3. The standard at issue here comes into play only in the event of a disagreement that cannot be resolved, when a due process hearing is requested. 20 U.S.C. § 1415(f)(1)(A). And because procedural violations can alone be sufficient to deny FAPE, *Rowley*, 458 U.S. at 206, the standard has work to do only when a

procedurally-compliant IEP—*i.e.*, one that, *inter alia*, sets measurable goals designed to ensure progress in the general education curriculum—is nonetheless decried as insufficient.

It is one thing for generalist judges to review whether an IEP was reasonably calculated to result in some educational benefit. It is quite another for them to determine which of several instructional alternatives is likely to generate some undefined quantum of benefit over another. The *Rowley* standard is workable precisely because "[o]nce the determination is made that the IEP was adequate, that ends the inquiry. [Judges] need not consider whether other programs would be better." *Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 86 (1st Cir. 2004) (citing *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 948–949 (1st Cir.1991)). *Rowley* thus made clear that under the IDEA there is no entitlement to the "best" program and courts need not choose between two proven methodologies. *M.M. ex rel. C.M. v. Sch. Bd. of Miami-Dade Cty., Fla.*, 437 F.3d 1085, 1102 (11th Cir. 2006) (citing *Rowley*, 458 U.S. at 204); *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988) ("*Rowley* and its progeny leave no doubt that parents, no matter how well-motivated, do not have a right under the [statute] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child.") (citations omitted).

Relieving judges of the impossible task of deciding which educational methodology might work best (when both alternatives work) makes sense. Because choosing between competing methodologies is not the

comparative advantage of generalist judges. Judges, in any context, "are not final because [they] are infallible, [but are only] infallible because [they] are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J. concurring). Yet under the inherently comparative standards proposed by Petitioner and the United States, generalist judges are given the last word on evaluating the likelihood of success of complex methodological choices.

In *Amici*'s view, asking administrative hearing officers or judges, who typically lack educational know-how, to determine which method of instruction is more likely to yield a subjectively-valued result undermines the very purpose of the multidisciplinary school teams and the IEP process itself, which is to create a structured and collaborative process steeped in knowledge and experience. "[M]ost issues that arise in hearings demand expertise concerning disability and education, not law." S. James Rosenfeld, *It's Time for an Alternative Dispute Resolution Procedure*, 32 J. OF THE NAT'L ASS'N OF ADMIN. L. JUDICIARY 544, 563 n.53 (2012). There is wide variation in the quality and type of hearing officers across the country, and "[m]any hearing officers are faced with the obligation to decide among proposals that they are not well trained to evaluate." *Id.* at 551.

Courts, as well, "lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" *Rowley*, 458 U.S. at 208 (quoting *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)). And "[c]ognizant that judges lack the on-the-ground expertise and experience of school administrators," this Court has

repeatedly "cautioned courts in various contexts to resist 'substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.'" *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 686 (2010) (quoting *Rowley*, 458 U.S. at 206). Thus, when reviewing FAPE determinations, federal courts are typically mindful that they "lack 'the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy.'" *T.K. v. N.Y. City Dep't of Educ.*, 810 F.3d 869, 875 (2d Cir. 2016) (quoting *M.H. v. N.Y.C. Dep't of Educ.*, 685 F.3d 217, 240–241 (2d Cir. 2012)).

But that is exactly what the heightened review standard espoused by Petitioner invites hearing officers and federal courts to do: "resolve ... difficult questions of educational policy." *Id.* Petitioner would have hearing officers and federal judges, in hindsight and without the benefit of experience and context, make judgments as to whether certain interventions should have been employed over others or which outcomes qualify as "meaningful" or "substantial" or "significant" enough.

Judges cannot make such qualitative calls without engaging in precisely the type of hindsight analysis that the circuits have roundly rejected. *E.g., Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990) ("An IEP is a snapshot, not a retrospective."); *O'Toole By & Through O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233*, 144 F.3d 692, 701–702 (10th Cir. 1998) ("Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement."); *R.E. v. New*

York City Dep't of Educ., 694 F.3d 167, 186 (2d Cir. 2012) (collecting cases and adopting the "majority view that the IEP must be evaluated prospectively as of the time of its drafting."). Neither Petitioner nor the United States challenge this "snapshot rule," under which "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date." *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993).

Yet, under the standards urged by Petitioner and the United States, judges will inevitably be enticed into relying on "hindsight evidence" to unfairly second-guess well-intentioned multidisciplinary teams that exercised their best-informed judgment when crafting an IEP. In contrast, the "reasonably calculated to achieve some benefit" standard from *Rowley* is a fully adequate and workable substantive check that reflects the relative distribution of expertise between courts and educators, honors congressional intent, and respects the good faith efforts of educators while avoiding the risk of impermissible hindsight rulings.

"[E]ducation of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). The more "robust" substantive review standards proposed by Petitioner and the United States insist otherwise by asking generalist federal judges to unsuitably intrude upon the province of educators. Neither the statutory scheme of the IDEA nor this Court's precedent supports such a change.

C. Heightened Substantive Standards Are Unworkable and Counter-Productive.

Beyond the incongruity with principles of federalism, the IDEA's text, and this Court's decisions, the (many different) standards offered by Petitioner and its *amici* also fail more pragmatic tests. How could a court possibly apply them in practice, especially when they diverge from congressionally-mandated standards for hearing officers? Petitioner does not say. Nor does Petitioner address the likely systemic consequence of engrafting a heightened substantive standard onto the IDEA: increased inequality in special education, between the have-nots and the have-enoughs-to-litigate.

1. Tellingly, neither Petitioner nor the United States attempt to apply their proposed standards to the facts of this case. It thus remains a puzzle as to how judges are to apply the recommended standards—whether characterized as "substantial benefit" or "substantially equal opportunity," or "significant educational progress"—in evaluating an IEP. And it is simply unrealistic to assume that courts will have the time and capacity to fully assess whether a certain practice employed by a school district is providing a child with sufficient educational benefit (or opportunity) as compared to countless other potential approaches which were not pursued, often for good reason.

The murky and subjective nature of the alternative standards proposed—how meaningful is "meaningful"? "Substantially equal" to what? What constitutes sufficiently "significant" progress?—would leave educators in the dark as to what, exactly, an IEP must

do to survive judicial review. The *Rowley* standard, in contrast, defers to the expertise of educators and recognizes that the substantive goals of the IEP process are best ensured through enforcement of its clear procedural protections, subject only to a rational-basis type substantive check.

Imposition of a qualitative assessment beyond the test that Congress has mandated for hearing officers, moreover, is simply unworkable. Petitioner insists that the "standard of review courts should apply when assessing the adequacy of IEPs is not at issue here," Pet. Br. 49, because their test "simply describes the level of education schools must strive to deliver." *Id.* Yet judges review the administrative decisions of hearing officers. And Petitioner challenges neither the substantive review criteria used at administrative hearings, nor the governing standard of judicial review of administrative decisions.

Courts currently engage in an independent, but circumscribed, review, "more critical . . . than clear-error review but . . . well short of complete *de novo* review," of administrative decisions. *C.F. ex rel. R.F. v. N.Y.C. Dep't of Educ.*, 746 F.3d 68, 77 (2d Cir. 2014) (quotation marks omitted). They give "due weight" to the state proceedings, affording particular deference where "the state hearing officers' review has been thorough and careful." *M.H. v. N.Y.C. Dep't of Educ.*, 685 F.3d 217, 241 (2d Cir. 2012) (quotation marks omitted).

But how can courts give "due weight" to the decisions of hearing officers if they are applying an entirely different test in determining whether a child has received FAPE? If judges apply one standard, and

hearing officers another, deference to administrative rulings offers no aid to generalist judges who wish to avoid making hard educational choices under the standards proposed by Petitioner and the United States. The result would be not only "permi[ssion] simply to set state decisions at nought," *Rowley*, 458 U.S. at 206, but arguably a requirement to do so. Such intrusive review would surely frustrate the "very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP." *Id.*

2. That Petitioner and the United States only tell, but do not attempt to show, how their respective standards would be outcome-determinative here proves not only that their standards are unworkable, but also that imposition of a new subjectively assessed test by reviewing courts may not even affect educational outcomes. While the educational results are uncertain, the costs are not: Changing the standard will lead to more litigation, likely resulting in the lopsided allocation of already limited resources.

Thus, the "substantially equal opportunity" standard advocated for by Petitioner will, ironically, generate greater inequality, by spurring litigation and favoring families with more resources that can better afford to litigate. The "cost and complexity of a due process hearing hinder low- and middle-income parents from [participating in them]. IDEA's complex protocols and mandates disproportionately benefit wealthy, well-educated parents, who can deftly and aggressively navigate the due process system with the aid of private counsel and paid education experts." *See* SASHA PUDELSKI, AASA, RETHINKING SPECIAL EDUCATION DUE

PROCESS, 7 (April 2016).[15] Educational outcomes may suffer too, as school districts often opt to yield to litigious parents, even against their best judgment, simply to avoid the costs of litigating. *Id.* at 3 (discussing results of a survey of 200 randomly selected school superintendents).

School districts across the country are already struggling with litigation costs, "spend[ing] over $90 million per year in conflict resolution," and data from the most populated states indicate that the annual number of due process hearing requests continues to increase. *Id.* at 23. Changing the rules of the game and imposing a heightened fuzzy standard different from the standard Congress mandated for hearing officers will only increase incentives to litigate, as dissatisfied parties seek reversal in court under a new and malleable standard.

Fomenting litigation runs directly counter to congressional intent, as "Congress has repeatedly amended the Act to reduce its administration and litigation-related costs." *Schaffer*, 546 U.S. at 59 (describing, *inter alia*, the 2004 amendments adding mandatory "resolution sessions" in § 1415(f)(1)(B) and 1997 amendments mandating that States offer mediation in § 1415(e)). Accountability mechanisms added through the ESEA and its predecessors, moreover, offer alternatives to litigation to ensure that districts are getting desired results, like establishing a complex set of compliance indicators and related

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[15] *Available at* http://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASARethinkingSpecialEdDueProcess.pdf.

penalties for school districts, including the potential loss of funding. PUDELSKI, RETHINKING SPECIAL EDUCATION DUE PROCESS, at 7; Resp. Br. 7-8.

In short, Congress wanted the ambitious goals set in 2004 to be achieved not through increased litigation, but by giving "[p]arents and schools . . . expanded opportunities to resolve their disagreements in positive and constructive ways." *See* 20 U.S.C. § 1400(c)(8). Increasing incentives to litigate by imposing an unworkable judicial standard different than the one Congress mandated for administrative hearings runs directly counter to Congress's intent.

III. THE "SOME BENEFIT" STANDARD IS WORKING TO ATTAIN THE IDEA'S GOALS.

As Congress's decision to leave the FAPE standard unchanged reflects, the *Rowley* standard is working. Never before have special education students been integrated so well, and achieved so much, as they have today. Petitioner and his *amici* offer no evidence to the contrary. Instead, they offer parade-of-horribles hypotheticals that they assume could occur unless this Court re-writes the IDEA to reject the *Rowley* standard. But a review of actual experience demonstrates that the courts faithfully applying *Rowley*'s "some benefit" standard are effective guardians against denials of FAPE. There is no reason for this Court to "fix" a system that not only is not broken, it is thriving.

1. The data belie any claim that the *Rowley* standard results in a race to the bottom by school districts, leading to low expectations and minimal

progress for students with disabilities in public schools. *See* Pet. Br. 17; U.S. Br. 30-31. *Rowley* has been in place for over three decades and has been faithfully applied by the overwhelming majority of the courts of appeals during that time. *See* Pet. for Certiorari 11-13 (collecting cases from the courts of appeals). Coupled with new mandates from the ESEA—as well as provisions of the IDEA distinct from the FAPE provision—the result has been a remarkable increase in educational opportunity and outcomes, not a race to the bottom. Under IDEA amendments and the intertwined statutory standards from the ESEA, the expectations for school districts to serve students with disabilities have never been higher.

Looking at just one important policy goal—integration or inclusion—students with disabilities are educated in integrated classrooms far more often than ever before. From 2005 through 2014, the percentage of students ages 6 through 21 served under IDEA who were educated inside a regular classroom environment for the vast majority of the day increased from 53.6% to 62.6%. ANNUAL REPORT, at 49. And those students are achieving good outcomes in ever higher numbers. Graduation rates are up over the same period—increasing from 54.4% to 66.1%, *id.* at 62—in an era of increasingly rigorous academic standards for graduation in many states. *See* Br. For Nat'l Ass'n of State Directors of Special Educ. as *Amicus Curiae* in Support of Neither Party 8 ("State Director *Amicus* Br.") (describing increasing standards and graduation rates for special education students from 2000 to the present). At the same time, dropout rates are down, decreasing from 28.3% to 18.5%. ANNUAL REPORT, at 62. These successes demonstrate

that the "nation's educators" have been "aim[ing] high *every day in the field*," which benefits not only special education students but entire school communities. State Director *Amicus* Br. 10. There is no need to implement a more stringent (and judicially intrusive) substantive FAPE standard when schools are already obligated to meet demanding achievement goals *and* their efforts are largely working.

2. The upward trajectory of special education in the country has occurred not *despite* the "some benefit" standard illuminated in *Rowley* but, at least in part, *because* of that standard. Courts faithfully applying *Rowley* have proved competent—and empowered—to identify and ameliorate situations where school districts have fallen short of what the IDEA guarantees, while still affording school districts the necessary flexibility to make difficult judgments about how best to provide educational benefits.

The real-world experience under *Rowley* is thus far from the educational malpractice hypotheticals that Petitioner and the United States put forward, tellingly without any evidence that any has ever occurred. *See* Pet. Br. 17; U.S. Br. 30-31. And the evidence is to the contrary. Courts are amply able to provide a safeguard against the dreadful examples posited by the other side. Thus, a district court operating in a circuit that applies *Rowley*—*i.e.*, does not impose a heightened substantive standard—recently held that a school district denied FAPE to a deaf high school student when it provided, but then removed, a speech-to-text transcription technology, leaving the student with only an often-malfunctioning amplification system as assistive technology. *See DeKalb Cty. Bd. of Educ. v.*

Manifold, No. 4:13-CV-901-VEH, 2015 WL 3752036, at *5-6 (N.D. Ala. June 16, 2015); *contra* U.S. Br. 30 (hypothesizing that "some benefit" standard would permit a school district to provide a service for two months and then remove it for the rest of the year).

Numerous examples show that courts provide an effective check without the aid of a heightened substantive standard. First, courts ensure the substantive adequacy of an IEP by enforcing the procedures that the IDEA demands. *See Rowley*, 458 U.S. at 206. Thus a district court in the Ninth Circuit, following the "some educational benefit" and "basic floor of opportunity" standard, rather than a heightened standard, concluded that a school district had failed to provide FAPE to a deaf student when it refused to discuss a referral to the California School for the Deaf, notwithstanding the school district's provision of the curriculum in sign language. *J.G. ex rel. Jiminez v. Baldwin Park Unified Sch. Dist.*, 78 F. Supp. 3d 1268, 1286, 1288-89 (C.D. Cal. 2016). Similarly, the Second Circuit upheld a district court's finding that a school district committed a procedural violation that denied FAPE when it refused to discuss whether bullying was impeding a student's ability to receive educational benefits, without deciding whether the IEP was also substantively invalid. *T.K.*, 810 F.3d at 876 & n.3.

Examples like these demonstrate that by enforcing the IDEA's procedural safeguards, courts are able to police against IEPs that disregard entire aspects of a student's disability or learning needs, contrary to the United States' hypotheticals, U.S. Br. 30. *See, e.g.*, *Brown v. D.C.*, 179 F. Supp. 3d 15, 29 (D.D.C. 2016)

(holding school district denied FAPE when it "failed to convene a meeting or incorporate the effects of plaintiff's recent shooting-related injuries when implementing his IEP").

Moreover, courts armed by *Rowley*'s "some benefit" standard have effectively guarded against substantive failures as well as procedural ones. When the evidence demonstrates that an IEP is not reasonably calculated to convey educational benefits, courts have not hesitated to require alternatives. *See, e.g., C.D. v. New York City Dep't of Educ.*, No. 15-CV-2177(ARR)(JO), 2016 WL 3453649, *17 (E.D.N.Y. June 20, 2016) (rejecting community-school placement of a middle schooler with a speech-language impairment and epilepsy because the "record unmistakably shows that a community school recommendation was not conducive to the student's progress"); *J.L. v. Manteca Unified Sch. Dist.*, No. 2:14-01842 WBS EFB, 2016 WL 3277260, *8 (E.D. Cal. June 14, 2016) (applying "basic floor of opportunity" standard and holding that school district failed to provide FAPE to an autistic student when it provided only consultation and not "direct speech and language services"); *W.S. v. City Sch. Dist. of the City of New York*, No. 15 CV 3806-LTS, 2016 WL 2993208, *8 (S.D.N.Y. May 23, 2016) (holding school district's provision of a classroom setting with a certain staff ratio denied an autistic student FAPE even though that setting was "generally appropriate for students with autism," because no evidence indicated the student "was capable of making educational progress" in that environment); *S.C. v. Katonah-Lewisboro Cent. Sch. Dist.*, 175 F. Supp. 3d 237, 259 (S.D.N.Y. 2016) (finding district denied FAPE to a sixth grader with multiple disabilities when it offered

instruction in a 12-student classroom and record indicated the student "required a smaller class and one-to-one instruction").

Courts thus have not stood idly or powerlessly by under *Rowley*. Rather, the *Rowley* standard regularly provides courts workable tools to intervene when school districts fail, while preserving school districts' flexibility to continue to achieve ever higher measures of success for their special education students, and all students. There is no reason for the Court to alter a standard that Congress has left untouched, and that has allowed special education students to thrive for over 30 years.

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

Ruthanne M. Deutsch
Counsel of Record
Hyland Hunt
Anne J. Jang
DEUTSCH HUNT PLLC
300 New Jersey Ave., NW
Suite 900
Washington, DC 20001
(202) 868-6915
rdeutsch@deutschhunt.com

Christopher P. Borreca
THOMPSON & HORTON LLP
3200 Southwest Freeway
Suite 2000
Houston, Texas 77027
(713) 554-6740

Counsel for Amici Curiae

December 21, 2016

APPENDIX

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Appendix 20 U.S.C. § 1415(f)(3)(E) 1a

20 U.S.C. § 1415(f)(3)(E) provides:

(E) DECISION OF HEARING OFFICER

(i) IN GENERAL – Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) PROCEDURAL ISSUES – In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies –

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate education to the parents' child; or

(III) caused a deprivation of educational benefits.

(iii) RULE OF CONSTRUCTION – Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

RECORD AND BRIEFS

No. 15-827

Supreme Court, U.S.
FILED
NOV 21 2016
OF THE CLER

IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR ADVOCATES FOR CHILDREN OF NEW YORK, CHILDREN'S LAW CENTER, INC., CONNECTICUT PARENT ADVOCACY CENTER, EQUIP FOR EQUALITY, THE LEGAL AID SOCIETY, LEGAL SERVICES NYC, NATIONAL CENTER FOR YOUTH LAW, NEW YORK LAWYERS FOR THE PUBLIC INTEREST, NEW YORK LEGAL ASSISTANCE GROUP, PARTNERSHIP FOR CHILDREN'S RIGHTS, AND STATEWIDE PARENT ADVOCACY NETWORK AS AMICI CURIAE IN SUPPORT OF PETITIONER

DANIEL WINIK
JUSTIN BAXENBERG
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

ALAN E. SCHOENFELD
Counsel of Record
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
alan.schoenfeld@wilmerhale.com

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INTEREST OF AMICI CURIAE

Amici curiae are advocacy and legal-services organizations committed to protecting the rights of children with disabilities to receive a quality education in public schools.[1]

For over forty years, Advocates for Children of New York (AFC) has worked with low-income families to secure quality public education services for their children, including children with disabilities. AFC provides a range of direct services, including advocacy for students and families in individual cases, and also pursues institutional reform of educational policies and practices through advocacy and litigation. AFC routinely advocates for the rights of children and their families under the Individuals with Disabilities Education Act (IDEA) and therefore has a strong interest in the proper interpretation of the IDEA.

The Children's Law Center, Inc. (CLC) is a non-profit organization committed to the protection and enhancement of the legal rights of children. CLC strives to accomplish this mission through various means, including providing legal representation for children and advocating for systemic and societal change. For over 27 years, CLC has worked in the field of special education to ensure that all youth, regardless of race, ethnicity, gender, sexual orientation, economic status or disability, have access to education programming which provides meaningful benefit. Each year, CLC represents hundreds of students with

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[1] Both parties have given written consent to the filing of all amicus briefs. No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

disabilities in ensuring that their rights under the IDEA are protected. To this end, CLC has a strong interest in ensuring that all students with disabilities receive an education appropriate to meet their unique needs.

Connecticut Parent Advocacy Center (CPAC) is Connecticut's federally-funded Parent Training and Information Center pursuant to 20 U.S.C. § 1482. CPAC's mission is to empower and support families, and inform and involve professionals and others interested in the healthy development and education of children and youth, with the goal of ensuring that all children and youth, including those with disabilities, receive the services needed to become productive, contributing members of their communities and our society. CPAC provides training and technical assistance to thousands of parents and professionals each year, on issues such as special education, school reform, rights of homeless and immigrant children, bilingual services, discipline and positive behavioral supports, parent involvement, and parent-professional collaboration.

Equip for Equality (EFE) is an independent, non-profit, civil rights organization for people with disabilities which administers the Protection and Advocacy System in the State of Illinois. EFE provides information, referral, self-advocacy assistance, and legal representation to people with disabilities throughout the State. One of EFE's primary areas of focus is the rights of children with disabilities. Every year, EFE assists approximately 1,500 children with disabilities seeking legal assistance in disputes with school districts. Specifically, EFE provides systemic and individual legal services to students with disabilities who are not receiving a free appropriate

public education as guaranteed by the IDEA. As a result, EFE has a strong interest in the proper interpretation of the IDEA.

The Legal Aid Society of New York City is the nation's oldest and largest provider of legal services to low-income families and individuals. Each year, the Society provides legal assistance in some 300,000 legal matters involving civil, criminal, and juvenile rights. A significant number of the Society's clients are children with disabilities, who struggle to obtain the educational services they need in order to be prepared for further education, employment, and independent living. The Society also provides extensive advocacy for adults with disabilities, many of whom did not receive adequate special education services as children and are now suffering lifelong consequences. The Society therefore has a significant interest in ensuring that students with disabilities have access to appropriate educational services under the IDEA.

Legal Services NYC (LSNYC) is one of the largest law firms for low income people in New York City, with 18 community-based offices and numerous outreach sites located throughout each of the City's five boroughs. LSNYC serves over 70,000 New Yorkers annually through a number of specialized practices, including disability advocacy and education rights. LSNYC regularly engages in litigation, advocacy, and education on behalf of public school students and their families related to the IDEA.

National Center for Youth Law (NCYL) is a private, non-profit organization that uses the law to help children in need nation-wide. For more than 40 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the

resources, support, and opportunities necessary for healthy and productive lives. NCYL provides representation to children and youth in cases that have a broad impact and has represented many children with disabilities in litigation and class administrative complaints to ensure their access to appropriate and non-discriminatory services. NCYL engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. NCYL pilots collaborative reforms with state and local jurisdictions across the nation to improve educational outcomes of children in the foster care and juvenile justice systems, with a particular focus on improving education for system-involved children with disabilities.

New York Lawyers for the Public Interest, Inc. (NYLPI) is a public interest law office founded in 1976 which, through its Disability Justice program and partnerships with community groups, advocates for the rights of persons with disabilities in New York. On both an individual and systemic basis, NYLPI represents low-income parents and their children with disabilities to ensure the children receive the free appropriate public education (FAPE) guaranteed by the IDEA, Section 504 of the Rehabilitation Act and state and local laws.

The New York Legal Assistance Group (NYLAG) is a not-for-profit law firm founded in 1990 to provide free civil legal services to low income New Yorkers who would otherwise be unable to afford or receive legal assistance. NYLAG assists the poor and near poor in New York City in accessing legal rights of vital importance. NYLAG's clients include, among others, seniors, immigrants, victims of domestic violence, Holocaust survivors, and at-risk children. With regard

to children, NYLAG represents them in special education cases and SSI appeals.

Partnership for Children's Rights (PFCR) is a nonprofit organization that provides free legal services to disabled children from low-income families throughout New York City in the area of special education. PFCR's mission is to ensure that each disabled child receives an appropriate education under the IDEA and a meaningful opportunity for self-sufficiency in adulthood.

The Statewide Parent Advocacy Network (SPAN) is New Jersey's federally funded Parent Training and Information Center pursuant to 20 U.S.C. § 1482. SPAN's mission is to empower and support families, and inform and involve professionals and others interested in the healthy development and education of children and youth with the goal of ensuring that all children and youth, including those with disabilities, receive the services needed to become productive, contributing members of their communities and our society. SPAN provides training and technical assistance to thousands of parents and professionals each year, on issues such as special education, school reform, rights of homeless and immigrant children, bilingual services, discipline and positive behavioral supports, parent involvement, and parent-professional collaboration.

SUMMARY OF ARGUMENT

In opposing certiorari, respondent contended that the Individuals with Disabilities Education Act (IDEA) relies almost exclusively on procedural requirements to meet Congress's goal of ensuring that students with disabilities receive a free appropriate public education.

Supp. Br. 1. Respondent abjures the notion that the IDEA imposes any substantive requirement at all on the education provided to students with disabilities, except for a requirement "that the education to which access is provided is reasonably calculated to confer more than a *de minimis* educational benefit." *Id.*

Respondent's position is at odds with this Court's decision in *Board of Education of the Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176 (1982), with Congress's subsequent amendments to the IDEA, and with common sense. In enacting and amending the IDEA, Congress elaborated a comprehensive scheme for ensuring that students with disabilities have an equal opportunity to succeed in the classroom, to "meet developmental goals," and to "be prepared to lead productive and independent adult lives, to the maximum extent possible." 20 U.S.C. § 1400(c)(5)(A)(i)-(ii). It would be surpassingly odd for Congress to legislate in the service of such ambitious goals, only to have local school districts fulfill their statutory obligations by developing individualized educational programs (IEPs) that check off the requisite procedural steps but confer barely any educational benefits on students with disabilities.

In arguing to the contrary, respondent relies heavily on the notion that this Court's decision in *Rowley* forecloses any substantive definition of what makes a free public education "appropriate," beyond the meaningless requirement imposed by the Tenth Circuit. Not so. *Rowley* recognizes that the requirement of a "free appropriate public education" must have some substantive meaning given Congress's desire to guarantee "meaningful" access to an education for children with disabilities. 458 U.S. at 192. And although the Court declined to answer the question of

how to determine "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the" IDEA, *id.* at 202, Congress stepped into the breach, clarifying in subsequent amendments that the IDEA's purpose is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living," 20 U.S.C. § 1400(d)(1)(A). The amendments thus make clear that an education supplies the necessary degree of benefit when the IEP is reasonably tailored "to meet the[] unique needs" of each student with a disability "and prepare [the student] for further education, employment, and independent living." *Id.*

Forswearing any substantive guidance from the statute, respondent theorizes that the IDEA's procedural provisions will sufficiently ensure that children with disabilities receive an appropriate education. But as the experiences of amici and their clients have shown, adherence to procedures alone does not ensure that students receive an education appropriate to meet their unique needs. Moreover, it is amici's experience that school districts, administrative hearing officers, and ultimately courts need more guidance on what constitutes the requisite educational benefit under *Rowley*.

Congress enacted and amended the IDEA because local educational authorities often lacked the understanding, ability, or will to meet the individualized needs of students with disabilities. Respondent's position assumes that Congress responded to those deficiencies by announcing ambitious goals for students with disabilities but

entrusting fulfillment of those goals to a procedural scheme alone. The Court should instead assume Congress intended that its high expectations be carried into effect, by ensuring that IEPs are substantively adequate to meet students' educational needs, not just that they are promulgated in accordance with a set of procedures and provide a "more than *de minimis*" degree of benefit.

ARGUMENT

I. THE IDEA GUARANTEES MEANINGFUL ACCESS TO EDUCATION

A. Congress Has Set Demanding Standards For The Education Of Students With Disabilities

In enacting and amending the IDEA, Congress has set the goal of ensuring that students with disabilities have an equal chance to succeed in leading productive and independent lives.

Congress's most recent findings—associated with the 1997 and 2004 amendments to the IDEA—establish that the statute aims not just to grant students with disabilities *access* to public school classrooms but to enable them to succeed there, to the maximum extent possible. Congress determined that although prior versions of the IDEA had "been successful in ensuring children with disabilities ... access to a free appropriate public education," the statute's implementation had "been impeded by low expectations." 20 U.S.C. § 1400(c)(3)-(4). It observed that during the three decades since the enactment of the IDEA's predecessor, the Education for All Handicapped Children Act of 1975, "research and experience ha[ve] demonstrated that the education of children with disabilities can be made more effective by ... having

high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible." *Id.* § 1400(c)(5). Congress found that students with disabilities are capable of "meet[ing] developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children," and that they should "be prepared to lead productive and independent adult lives, to the maximum extent possible." *Id.* § 1400(c)(5)(A)(i)-(ii).

Consistent with these findings, Congress has specified that one of the IDEA's purposes is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). Congress has also declared a "national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." *Id.* § 1400(c)(1).

It is inconceivable, given Congress's findings and its exposition of the ambitions of the IDEA, that the "free appropriate public education" Congress meant to guarantee, 20 U.S.C. § 1412(a)(1)(A), was one providing just barely more than a *de minimis* benefit to students with disabilities. Rather, Congress has prescribed that public schools must give students with disabilities an education that is substantially equal—in its rigorous demands and high expectations—to the one received by all other students.

B. *Rowley* Reserved The Question Of What Constitutes Meaningful Access To Education, But Congress Has Since Answered It

The Tenth Circuit's precedents—and respondent's position at the certiorari stage—rest on the notion that any genuine substantive requirement of an "appropriate" education is foreclosed by this Court's decision in *Board of Education of the Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176 (1982). But *Rowley* does not support, let alone compel, that crabbed reading. Rather, *Rowley* recognizes that the requirement of a "free appropriate public education" must have some substantive meaning given Congress's desire to guarantee "meaningful" access to an education for children with disabilities. *Id.* at 192.

In *Rowley*, the Court addressed a challenge to an IEP for Amy Rowley, a first-grade student with a hearing impairment. 458 U.S. at 184-186. Amy's parents asked the school district to provide a sign-language interpreter in each of her classes. *Id.* at 184. Instead, the IEP provided for her to use a hearing aid and receive periodic instruction from a tutor and a speech therapist. *Id.*

The district court ruled in favor of Amy's parents. The court found that Amy was "'a remarkably well-adjusted child,'" who "interact[ed] and communicate[d] well with her classmates and ha[d] 'developed an extraordinary rapport' with her teachers." 458 U.S. at 185. Amy was, in fact, "'perform[ing] better than the average child in her class and [was] advancing easily from grade to grade.'" *Id.* Nonetheless, the district court determined that she was not receiving a "'free appropriate public education'" because she could "'understand[] considerably less of what goes on in

class than she could if she were not deaf' and thus '[was] not learning as much, or performing as well academically, as she would without her handicap.'" *Id.* The Second Circuit embraced that analysis. *Id.* at 186.

This Court rejected the lower courts' conclusions that in enacting the IDEA, Congress intended "to achieve strict equality of opportunity or services" between students with and without disabilities. 458 U.S. at 198. Looking to "the *language* of the statute," the Court found no "substantive standard prescribing the level of education to be accorded handicapped children." *Id.* at 189 (emphasis added).

The Court's analysis did not end with the language of the statute, however. Rather, the Court proceeded to examine other indicia of the IDEA's meaning. And in doing so, it recognized that the requirement of a "free appropriate public education" must have some substantive meaning.

First, the Court opined that in seeking "to make public education available to handicapped children," Congress must have intended "to make such access meaningful." 458 U.S. at 192. In the Court's view, Congress did not intend to "impose upon the States any *greater* substantive educational standard than" that. *Id.* (emphasis added). But the requirement of "meaningful" access to an education is itself a substantive threshold. The Court recognized, for example, that "furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement." *Id.* at 198-199.

Second, the Court held that "the congressional purpose of providing access to a 'free appropriate public education'" implies "the requirement that the

education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." 458 U.S. at 200. "It would do little good," the Court recognized, "for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education." *Id.* at 200-201.

The *Rowley* Court left open the question of how to determine "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the" IDEA. 458 U.S. at 202. But it did so simply because resolving that question was unnecessary, in a case in which the student with disabilities was "receiving substantial specialized instruction and related services" and was "performing above average in the regular classrooms of a public school system." *Id.*; *see Polk* v. *Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180 (3d Cir. 1988) ("*Rowley* was an avowedly narrow opinion that relied significantly on the fact that Amy Rowley progressed successfully from grade to grade in a 'mainstreamed' classroom."); *see also Deal* v. *Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 863 (6th Cir. 2004) (same).

Fortunately, Congress's post-*Rowley* amendments to the IDEA have answered the question reserved by the *Rowley* Court: What degree of "educational benefit" is required for a student with a disability to have "meaningful access" to a free public education? Congress has stated that one of the amended IDEA's purposes is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A).

Congress has thus directly indicated what sort of "free appropriate public education" it regards as supplying the requisite educational benefit—namely, one that is reasonably tailored "to meet the[] unique needs" of students with disabilities "and prepare them for further education, employment, and independent living." *Id.*

Moreover, whereas the *Rowley* Court found no "congressional intent to achieve *strict* equality of opportunity or services" between students with disabilities and those without, 458 U.S. at 198 (emphasis added), Congress has since declared a "national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities," 20 U.S.C. § 1400(c)(1).

The Tenth Circuit's standard—under which an IEP is substantively adequate so long as the educational benefit it provides is "more than *de minimis*," Pet. App. 16a (internal quotation marks omitted)—is irreconcilable with Congress's articulation of what the IDEA is meant to achieve. As the Sixth Circuit has observed, "states providing no more than *some* educational benefit could not possibly hope to attain the lofty goals proclaimed by Congress." *Deal*, 392 F.3d at 864.

II. ADHERENCE TO IDEA PROCEDURES CANNOT GUARANTEE MEANINGFUL ACCESS TO EDUCATION

Respondent argues that "the IDEA's procedural requirements ensure that a child's access to public education is meaningful." Supp. Br. 8 (internal quotation marks omitted). That is incorrect. The experiences of children with disabilities, their families, and their advocates have shown that the procedures

specified by the IDEA, while critical to protecting the rights of children with disabilities and their parents, cannot by themselves guarantee that children with disabilities will receive the education to which the statute entitles them. Procedures are only as meaningful as the substantive objectives that they are employed to promote. To ensure that access to education is meaningful, and substantially equal among students with and without disabilities, the IDEA's procedural protections must be coupled with substantive requirements that exceed the Tenth Circuit's meaningless formulation.

A. The IDEA's Procedural Requirements Provide No Substantive Protection To Students With Disabilities

The IDEA provides an extensive procedural framework for assessing the needs of a child with disabilities, developing an appropriate IEP, and ensuring that the IEP functions as intended. In the absence of meaningful substantive requirements, however, even the most careful adherence to those procedures cannot ensure that children with disabilities have access to the education that Congress envisioned. Congress did not prescribe procedure for the sake of procedure; it crafted the IDEA's procedural framework in the service of a substantive requirement that states provide children with disabilities access to an education that will "prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). The IDEA's procedures must be understood as means to achieving this purpose, not as ends in themselves.

The first set of procedures focuses on the assessment of the educational needs of children with

suspected disabilities. The statute requires an initial evaluation using "a variety of assessment tools" to determine whether the child has a disability and how to shape the IEP in order to "enabl[e] the child to be involved in and progress in the general education curriculum." 20 U.S.C. § 1414(b)(2)(A). The IEP team must review evaluations and information provided by the child's parents and teachers and identify and obtain any additional necessary information. *Id.* § 1414(c)(1). Once the assessment is completed, the same statutorily defined "team of qualified professionals," together with the child's parents, must determine the educational needs of the child. *Id.* § 1414(b)(4)(A).

The IDEA next prescribes procedures for developing an IEP that will meet the child's needs. The IDEA requires every IEP to include various elements: a description of the child's level of academic performance, a set of annual goals designed to meet the child's disability-related needs, an explanation of how progress towards these annual goals will be measured, a statement of the services that will be provided to the child, and a projected date for services to begin. 20 U.S.C. § 1414(d)(1)(A)(i). If the child will not participate with children without disabilities in a general-education classroom or will require accommodations for statewide or districtwide assessments, the IEP must explain the extent of the nonparticipation or accommodation. *Id.* § 1414(d)(1)(A)(i)(V)-(VI). And beginning with the school year in which the child turns 16, the IEP must include "appropriate measurable postsecondary goals" for enabling the child to transition from high school into further education or independent living. *Id.* § 1414(d)(1)(A)(i)(VIII)(aa).

In developing the IEP, the IEP team must consider "the strengths of the child," "the concerns of the parents," "the results of the initial ... or most recent evaluation of the child," and "the academic, developmental, and functional needs of the child." 20 U.S.C. § 1414(d)(3)(A)(ii)-(iv). The team must also consider "positive behavioral interventions" for children with behavior that interferes with learning, the language needs of children with limited English proficiency, the special communication needs of children with visual or auditory impairments, and the use of assistive technology if appropriate. *Id.* § 1414(d)(3)(B).

The final set of procedures is meant to ensure that the IEP is functioning as intended. The IEP must be reviewed at least annually and revised as appropriate to address any issues that may arise. 20 U.S.C. § 1414(d)(4)(A). Parents must be provided the opportunity to review records relating to their child and must receive written notice before any significant change is made to their child's education. *Id.* § 1415(b)(1), (3). And if parents are dissatisfied with their child's IEP or the treatment their child is receiving, they have the right to a due process hearing before an impartial hearing officer. *Id.* § 1415(f). A party aggrieved by the hearing officer's decision ultimately may resort to state or federal courts. *Id.* § 1415(g), (i)(2).

These procedures are indisputably detailed. But in arguing that the procedures themselves do the work of achieving Congress's purposes for the IDEA, respondent profoundly misses the point. Like procedures of all kinds, the IDEA's procedures are only means by which the people implementing them work toward a substantive goal. If the Tenth Circuit were

correct that the IDEA's only substantive requirement is for students with disabilities to achieve "more than *de minimis*" results, then that is the only outcome the procedures will in turn promote. That is the standard by which the IEP team will be compelled to determine the child's educational needs, 20 U.S.C. § 1414(b)(4)(A); the standard by which the child's educational goals must be determined, *id.* § 1414(d)(1)(A)(i); and—importantly—the standard by which a hearing officer reviewing the IEP will determine "whether the child received a free appropriate public education," *id.* § 1415(f)(3)(E)(i). An IEP would comply with the IDEA under this view so long as it were adopted using the proper procedures, even if the plan proved to be all but completely ineffective.

Indeed, respondent concedes that the consequence of its interpretation is that the IDEA poses no bar to an IEP under which a school district "offer[s] assistive technology to a hearing-impaired child in just one class, so long as the child made progress in that class." Supp. Br. 10-11. Respondent suggests that such an IEP would violate the Americans with Disabilities Act (ADA). Supp. Br. 11. But even if that were true, it is hardly a satisfying answer to why the IDEA should be construed to allow such an absurd result. That is particularly so for amici and their clients—generally poor parents seeking to protect their children's rights in the labyrinthine administrative and court proceedings for review of IDEA claims. The notion that parents would need to pursue a school's failure to fulfill its IEP goals in an IDEA proceeding, and separately pursue the school's failure to provide accommodations for the same disability in a proceeding brought under the ADA, is preposterous. Aside from the potential exhaustion issues, *c.f. Fry* v. *Napoleon*

Community Schools, No. 15-497 (argued Oct. 31, 2016), the ADA imposes different obligations and affords different defenses than the IDEA. In the hypothetical posited by the government and addressed by respondent, for example, the school district could escape any ADA liability by demonstrating that the provision of assistive technology in every class "would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.164. The IDEA allows no such defense.

Respondent argues that courts are not permitted "to second-guess the *substance* of ... educational decisions" made by an IEP team "by requiring a 'particular outcome' or 'level of education.'" Supp. Br. 9. But when Congress legislates toward particular ends, it rarely does so on a wing and a prayer, stating the objective without actually mandating that it be carried out. The Court should not presume Congress acted so cavalierly in enacting and amending the IDEA, particularly in view of the basic statutory command that educators pursue the substantive objective of providing an education reasonably tailored "to meet the[] unique needs" of students with disabilities "and prepare them for further education, employment, and independent living," 20 U.S.C. § 1400(d)(1)(A).[2] That result would be inconsistent with Congress's concern that "low expectations" not be permitted to hold back

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[2] Indeed, in introducing the Conference Report for the amended IDEA, Senator Gregg described the amendments as "shift[ing] focus away from compliance with burdensome and confusing rules, and plac[ing] a renewed emphasis on our most fundamental concern[,] making sure that children with disabilities receive a quality education." 150 Cong. Rec. S11,653, S11,654 (daily ed. Nov. 19, 2004).

children with disabilities, *id.* § 1400(c)(4)—a clear indication that Congress recognized the role of strong federal standards in ensuring that school districts provide sufficient education to children with disabilities.

Respondent attempts to analogize the IDEA to the Administrative Procedure Act (APA), on the theory that both statutes "achieve[] Congress's goals through [their] *procedures*." Supp. Br. 9. But that analogy, far from supporting respondent's position, highlights its weakness. The APA alone does not achieve Congress's goals; rather, it provides mechanisms for guiding and correcting agencies as they carry out the purposes specified in substantive law by Congress. *See Judulang* v. *Holder*, 132 S. Ct. 476, 485 (2011) (agency action "must be tied" to the purposes of the law). And when agencies fail to act in a manner reasonably calculated to promote Congress's purposes, courts can and do overturn their actions for contravening or misinterpreting the underlying substantive law. *See, e.g.*, *id.* at 490 (overturning Board of Immigration Appeals interpretation "unmoored from the purposes and concerns of the immigration laws"); *Massachusetts* v. *EPA*, 549 U.S. 497, 528 (2007) (holding that the Clean Air Act barred EPA's argument that it could not regulate greenhouse gas emissions from automobiles).

Unlike the APA, the IDEA's procedures do not implement some other congressional objective manifest in some other statute; those procedures implement the same statute's substantive objectives. In the IDEA, as in the statutes that federal agencies are charged with implementing, Congress has specified the purpose that it wants carried out: Congress wants school districts to give students with disabilities an education that is "designed to meet their unique needs and prepare them

for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). IEPs that fail to pursue that purpose are just as unlawful as agency actions that fail to pursue the substantive goals Congress has set. Respondent's position—that Congress had no interest in the results achieved by an IEP, so long as the requisite procedures were followed—is as untenable as the notion that a court reviewing a regulation under the APA need not look to the statute being administered so long as the regulation was issued through notice-and-comment rulemaking. That is not how the APA functions, and it should not be how the IDEA functions.

B. The Courts' Implementation Of The IDEA Demonstrates The Ineffectiveness Of Relying On Procedural Protections Alone

Respondent claims that the IDEA's procedures "ensure that educators *do* aim high when they develop an IEP in collaboration with the child's parents." Supp. Br. 9. Unfortunately, the "more than *de minimis*" standard adopted by the Tenth Circuit and other courts has resulted in children with disabilities being denied the services they need to obtain a meaningful education. Congress surely did not intend to construct a statute that acknowledges the government's "responsibility to provide an equal educational opportunity for all individuals," 20 U.S.C. § 1400(c)(7), and promises "to ensure that the rights of children with disabilities and parents of such children are protected," *id.* § 1400(d)(1)(B), but fails to actually keep those promises. The caselaw shows how fealty to IDEA's procedural requirements often fails to advance the statute's ambitious substantive aims.

Consider Luke P., a child with autism, on whose case the Tenth Circuit relied in rejecting Endrew F.'s appeal. Pet. App. 3a, 16a, 19a, 21a (citing *Thompson R2-J Sch. Dist.* v. *Luke P. ex rel. Jeff P.*, 540 F.3d 1143 (10th Cir. 2008)). Luke began receiving special-education services in kindergarten, after being diagnosed with autism at the age of two. During kindergarten and first grade, he achieved many of his IEP goals and made significant progress, but he began to demonstrate problems with applying skills learned in the classroom to non-classroom environments. 540 F.3d at 1145-1146. Luke transferred to another public school in the second grade, and continued to make some progress, but his behavioral challenges increased. He refused to sleep in a bed, woke up frequently throughout the night, and "developed a habit of intentionally spreading his nighttime bowel movements around his bedroom." *Id.* at 1146.

After an occupational therapist determined that "since transferring ... Luke had apparently regressed in certain respects," 540 F.3d at 1146, Luke's parents determined that he required residential treatment tailored to students with autism. The school district insisted that Luke could receive an adequate education in his current placement, in spite of the behaviors he was exhibiting. Luke's parents subsequently sought a due process hearing under the IDEA, and the impartial hearing officer agreed with them that the district's proposed IEP was inadequate. *Id.* at 1147. This determination was upheld on administrative appeal by an administrative law judge who noted that Luke "'was unable to transfer any of his learned skills and use them in environments outside of school.'" *Id.* After the school district brought suit in federal court, the district court agreed with the hearing officer and the ALJ that

the IEP was insufficient because "'whatever educational progress Luke made ... was meaningless if there was no strategy to ensure those skills would be transferred outside of the school environment.'" *Id.* at 1154.

The Tenth Circuit reversed. Like respondent, the Tenth Circuit viewed the IDEA as establishing "procedures to guarantee disabled students access and opportunity, not substantive outcomes." 540 F.3d at 1151. The remainder of the court's analysis followed from the premise that compliance with the IDEA's procedural requirements sufficed, irrespective of the substantive quality of the child's educational development. Because Luke had been making "some progress"—even though that progress was minimal and, as noted by the district court, "'meaningless'"—the court determined that it was "constrained" to disagree with the district court, the ALJ, and the hearing officer. *Id.* at 1154-1155. Rather, the court held, "[t]he fact that ... Luke *was* making some educational progress and had an IEP reasonably calculated to ensure that progress continued [was] sufficient to indicate compliance," regardless of how minimal that progress was. *Id.* at 1154.

Or consider Endrew F., the petitioner in this case. As the petitioner's brief explains (at 8-12), the IEP that respondent offered Endrew and his parents may have complied in every respect with the IDEA's procedural requirements—but even if it did, it was plainly inadequate to provide Endrew with meaningful access to the classroom and a substantially equal opportunity for an education. Respondent's paean to procedure rings particularly hollow given respondent's own failure to live up to its lofty claims about how

procedural compliance will necessarily ensure good educational outcomes.

So long as courts refuse to apply a meaningful substantive standard in reviewing the adequacy of IEPs, the procedures required by the IDEA will be inadequate to protect the rights of children with disabilities to receive an education. This Court should clarify that the IDEA requires more.

III. The Court Should Articulate As Detailed A Standard As Possible

In the mine run of cases, the IDEA is implemented by the IEP team (composed of educators and parents) and by state administrative officers, who hear challenges to the adequacy of the IEP. Those parties need express direction from this Court as they fulfill their statutory responsibilities to guarantee meaningful access to education for students with disabilities. The Court would do little to clarify the law if it were simply to reject the Tenth Circuit's standard of a "more than *de minimis*" benefit in favor of a "meaningful benefit" standard, without giving content to the definition of a "meaningful benefit" as suggested above. That is particularly so because, among other things, the Circuits have used the phrase "meaningful benefit" in different ways.

The Third and Sixth Circuits correctly regard a "meaningful" educational benefit as one that exceeds the Tenth Circuit's low threshold. *See, e.g., Ridgewood Bd. of Educ.* v. *N.E.*, 172 F.3d 238, 247 (3d Cir. 1999) ("[t]he provision of merely 'more than a trivial educational benefit' does not meet" the Circuit's "'significant learning' and 'meaningful benefit'" standards), *superseded by statute on other grounds as*

recognized by P.P. ex rel. Michael P. v. *W. Chester Area Sch. Dist.*, 585 F.3d 727, 730 (3d Cir. 2009); *Deal*, 392 F.3d at 862-864 (similar). Other Circuits, however, have equated the "meaningful benefit" standard with the Tenth Circuit's. *See, e.g., Rockwall Indep. Sch. Dist.* v. *M.C. ex rel. M.C.*, 816 F.3d 329, 338 (5th Cir. 2016) (contrasting a "meaningful" benefit with one that is "'a mere modicum or *de minimus*'"); *O.S. ex rel. Michael S.* v. *Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015) ("Using 'meaningful' ... was simply another way to characterize the requirement that an IEP must provide a child with more than minimal, trivial progress."); *D.B. ex rel. Elizabeth B.* v. *Esposito*, 675 F.3d 26, 34 (1st Cir. 2012) ("[T]he IDEA calls for more than a trivial educational benefit, in line with the intent of Congress to establish a 'federal basic floor of meaningful, beneficial educational opportunity.'"). Even within each Circuit, the courts have differing interpretations of the level of progress that reaches an educational benefit.

Parents and school administrators require as much clarity as possible in making the difficult choices involved in educating students with disabilities. Parents must understand the governing standard in order to advocate for their children. The clarity of the standard is particularly important when parents must make the difficult choice to pull their child out of a public school and enroll the child in a private school—a choice that can be financially devastating if a court ultimately holds, as the lower courts did in this case, that the public school was providing a "free appropriate public education." School administrators likewise cannot properly fulfill their obligations under the IDEA unless they understand what educational benefits they are obligated to provide.

The Court should therefore hold, consistent with *Rowley* and with Congress's subsequent amendments to the IDEA, that a public education is substantively "appropriate" if it is reasonably tailored "to meet the[] unique needs" of students with disabilities "and prepare them for further education, employment, and independent living," 20 U.S.C. § 1400(d)(1)(A).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DANIEL WINIK
JUSTIN BAXENBERG
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

ALAN E. SCHOENFELD
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
alan.schoenfeld@wilmerhale.com

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IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE COALITION OF TEXANS WITH DISABILITIES, DECODING DYSLEXIA AND DON'TDISMYABILITIES, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

SONJA D. KERR
CUDDY LAW FIRM, PLLC
DIRECTOR OF IMPACT LITIGATION
8723 Shoal Creek Boulevard
Austin, Texas 78757
(512) 649-3191

ANDREW K. CUDDY
Counsel of Record
JASON H. STERNE
CUDDY LAW FIRM, PLLC
5693 South Street Road
Auburn, New York 13021
(315) 370-4020
acuddy@cuddylawfirm.com

Counsel for Amici Curiae

269266

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INTEREST OF THE *AMICI CURIAE*

Amicus Curiae the Coalition of Texans with Disabilities[1] is the oldest and largest consumer driven cross-disability organization in Texas and provides advocacy and public policy leadership throughout Texas. Formed in 1978, the Coalition promotes full inclusion of students with disabilities in all aspects of society. The Coalition works in communications, education, housing, and employment on behalf of Texans with a wide variety of disabilities, including physical impairments, deafness, intellectual disabilities, autism and others. It is keenly aware that thousands of Texas children with disabilities grow up to be Texas adults with disabilities who need jobs, housing and a good standard of living. The Coalition's interest in this brief is based upon its strong belief in the IDEA's promise to ensure equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

Amici Curiae Decoding Dyslexia is a network of parent-led grassroots organizations in all fifty states concerned with the limited access to educational interventions for students with dyslexia within the public education system. The organizations aim to raise dyslexia awareness, empower families to support their children and inform policy-makers on best practices to identify, remediate and support students with dyslexia. Three of

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1. No counsel for a party authored this brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the amicus curiae, its members, or its counsel, made such a monetary contribution to the preparation or submission of this brief.

these organizations are within the Fifth Circuit and have a special interest in this litigation because of that Court's reliance on the *Cypress-Fairbanks* standard. Decoding Dyslexia Texas is interested in the present case because of the many children in Texas whose education has been marginalized by the state's implementation of the IDEA and aspires to ensure that children with dyslexia and other disabilities receive the instruction they need to be successful in school and life. Decoding Dyslexia Louisiana wants to ensure the Court understands that holding schools accountable for special education at a "less than trivial" level is failing Louisiana's bright and capable students. Decoding Dyslexia Mississippi wishes to emphasize the extreme need for a meaningful program of education for children with dyslexia and ADHD, many of whom are bright and even gifted but who are not provided the research-driven instruction they need to succeed in school and, ultimately, life.

Amicus Curiae Don'tDismyAbilities, Inc. is a non-profit organization based in Texas. Its mission is to identify, develop, and employ strategies that make positive impacts for individuals with disabilities, their families and their neighborhoods through community education, advocacy and ADA-related actions. Founded in 2015, Don'tDismyAbilities, Inc. advocates for children with disabilities through educational advocacy and supports strategies to help them find success at school instead of placing them in the "school-to-prison pipeline." The organization serves clients of school age throughout the State of Texas. Don'tDismyAbilities interest in this case is based upon its fundamental commitment to children with disabilities receiving a quality education in Texas schools.

SUMMARY OF ARGUMENT

The educational lives of children with disabilities who live in Texas, Mississippi and Louisiana are uniquely impacted by an outdated legal standard known as the *Cypress Fairbanks v. Michael F.* four-factor standard. *Cypress-Fairbanks Independent School Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997) cert denied 522 U.S. 1047 (1998). Amici believe that this Court should clarify that any substantive standard must be consistent with today's IDEA and must dovetail with its procedural requirements. Amici propose an approach ensuring: 1) full and comprehensive evaluations and present levels of performance so as to result in individualized planning; 2) annual measurable goals (and, when required, short-term objectives) that address all of the child's areas of need as set forth in the present levels of performance; 3) provision of special education and related services to remediate each identified area of need via specialized instruction; 4) use of research-based methodologies to the extent practicable; and 5) sufficient modifications, accommodations, and technologies offered to allow the student to progress in the regular curriculum, at grade level, in spite of the deficits due to disability, while the deficits are being remediated.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF THE ACT

In 1975, Congress enacted the Education for All Handicapped Children Act (EAHCA), the predecessor to the Individuals with Disabilities Education Improvement Act (IDEA 2004). Pub. L. 94-142 at 89 Stat. 773. The EAHCA stated that its purpose was "to assure that all

handicapped children have available to them, within the time periods specified in section 612(2)(B), a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and ensure the effectiveness of efforts to educate handicapped children." 89 Stat. 775.

In 1982, this Court decided *Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176 (1982), its first foray into the murky world of the "free appropriate public education" or FAPE. The Rowleys contended that "the goal of the Act is to provide each handicapped child with an equal educational opportunity." 458 U.S. at 198. The lower courts apparently concurred, holding that "the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children." *Id.*, at 200.

In dissent, Justice White, joined by Justices Brennan and Marshall, argued that "[t]he legislative history thus directly supports the conclusion that the Act intends to give handicapped children an educational opportunity commensurate with that given other children." 458 U.S. at 214. The dissent stated that "[t]he basic floor of opportunity is instead, as the courts below recognized, intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible." *Id.*, at 215. Justice Blackmun, concurring in the judgment, explained that "Congress

unambiguously stated that it intended to 'take a more active role under its responsibility for equal protection of the law to guarantee that handicapped children are provided equal educational opportunity.' S. Rep. No. 94-168, p. 9 (1975) (emphasis added)... the question here is not, as the court says, whether Amy Rowley's individualized education program was 'reasonably calculated to enable her to receive educational benefits,' measured in part by whether or not she 'achieves passing marks and advances from grade to grade.' Rather, the question is whether Amy's program, viewed as a whole, offered her an opportunity to understand and participate in the classroom that was substantially equal to that given her nonhandicapped classmates. This is a standard predicated on equal educational opportunity and equal access to the educational process, rather than upon Amy's achievement of any particular educational outcome." *Id.*, at 210.

The *Rowley* majority, however, believed "that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.' " 458 U.S. at 196. Thus,

> [t]he District Court and the Court of Appeals [] erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Desirable though that goal might be, it is not the standard that Congress imposed upon States which receive funding under the Act. Rather,

> Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education.

Id. The Court then found "that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Id.*, at 200.

Subsequent amendments to the Act, and clarifications by the United States Department of Education, better identified the children to be served as understanding of educational disabilities improved. One important change to the law was the inclusion of specific different disabilities not previously recognized in the original EHA or EAHCA. Here, Endrew F. was diagnosed with autism at age two and with attention deficit hyperactivity disorder (ADHD) a year later. *Endrew F.*, 798 F.3d at 1333. Autism "means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences." 34 C.F.R. § 300.8(c)(1)(i).

When this Court decided *Rowley*, in 1982, autism was not yet a disability category within the statute and ADHD was not expressly acknowledged as a basis for eligibility for services. Congress did not add the definition of autism to the list of disabilities in the Act until the 1990 reauthorization. 20 U.S.C. § 1401(3)(A), 104 Stat. 1103; compare 89 Stat. 774, 84 Stat. 175. Autism is now described

at 34 C.F.R. § 300.8(c)(1)(i). In 1991, the United States Department of Education issued a policy memorandum that a child with ADHD could be served under various categories, including a specific learning disability, emotional disturbance or other health impairment. *Letter to Williams*, 21 IDELR 73 (OSEP 1994). In 1997, ADHD was added to the regulatory definition of other health impairment. 34 C.F.R. § 300.8(c)(9). Thus, when this Court considered *Rowley*, the two primary disabilities Endrew F. experiences on a daily basis were not even recognized within the law.

In 1997, Congress made other important substantive changes. The legislative history reveals that Congress found that "[s]ince the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities[ ]" and that "the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." 111 Stat. 39, presently codified at 20 U.S.C. § 1400(c)(3) & (4). A standard that only requires an eligible child's programming to be reasonably calculated to bestow "some educational benefit" on the child thus runs counter to the intent of Congress in 1997.

As part of the 1997 reauthorization, Congress also found that "[o]ver 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by [] having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible" and by "supporting high-quality, intensive professional development for all personnel who work with such children in order to ensure that they have the skills and knowledge necessary to enable them [] . . . to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children; and . . . to be prepared to lead productive, independent, adult lives, to the maximum extent possible[.]" 11 Stat. 40, presently codified at 20 U.S.C. § 1400(c)(5)(A) & (E).

The 1997 amendment thus evidences congressional intent to move beyond *Rowley*'s focus on access over equality of opportunity, and to increase the level of benefit provided by the Act. The Tenth Circuit's standard in this case, merely requiring "more than *de minimis*" benefit, runs entirely counter to the congressional findings in the current IDEA, and represents exactly the sort of "low expectations" Congress found was impeding the implementation of its purpose in enacting IDEA. See *Endrew F. v. Douglas County School Dist. Re-1*, 798 F.3d 1329, 1338 (10th Cir. 2015); and 20 U.S.C. § 1400(c)(4) (low expectations).

Congress went even further seven years later. The 2004 reauthorization includes the requirement that "the special education and related services and supplementary aids and services" be "based on peer-reviewed research to the extent practicable[.]" 20 U.S.C. § 1414(d)(1)(A)(i)

(IV). Congress found that implementation of IDEA "has been impeded by the failure of schools to apply replicable research on proven methods of teaching and learning." IDEA 2004 includes numerous references to "scientifically based instructional practices" and "research based interventions." In describing permissible uses of federal funds, IDEA 2004 includes "providing professional development to special and regular education teachers who teach children with disabilities based on scientifically based research to improve educational instruction." 20 U.S.C. § 1411(e)(2)(C)(xi). The child's IEP must include "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable to be provided to the child." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). In determining whether a child has a specific learning disability, IDEA 2004 describes a process by which the IEP team "may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation [process.]" 20 U.S.C. § 1414(b)(6)(B). This language in IDEA 2004 creates new requirements for schools to use scientific research-based instructional practices and interventions, if such research exists. Congress' goal was to ensure equality of opportunity, full participation, independent living and economic self-sufficiency. 20 U.S.C. § 1400(c)(1), (4).

As one educational commentator explained:

> The inclusion of this terminology may prove to be significant to future courts when interpreting the FAPE mandate because the law directs IEP teams, when developing a student's IEP, to base the special education services to be provided on

> reliable evidence that the program or service works. To comply with this new requirement, therefore, special education teachers should use interventions that empirical research has proven to be successful in teaching behavioral and academic skills to students with disabilities.

Jean B. Crockett & Mitchell L. Yell, *Without Data All We Have Are Assumptions: Revisiting the Meaning of a Free Appropriate Public Education*, 37 J.L. & Educ. 381, 388 (2008), cited in Mark Weber, *Common-Law Interpretation of Appropriate Education: The Road Not Taken in Rowley*, 41 J.L. & Educ. 95 (January, 2012), n. 152.

II. THE FIFTH CIRCUIT'S CYPRESS-FAIRBANKS STANDARD

Shortly after the 1997 reauthorization, the Fifth Circuit issued a decision in *Cypress-Fairbanks Independent School Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997) cert denied 522 U.S. 1047 (1998). The *Michael F.* court adopted a four-factor test, namely whether

(1) the program is individualized on the basis of the student's assessment and performance;

(2) the program is administered in the least restrictive environment;

(3) the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and

(4) positive academic and non-academic benefits are demonstrated.

> 118 F.3d at 253. The four-factor test was adopted by the Fifth Circuit and mandated as the way that hearing officers, district courts and the Circuit itself are to determine whether a student has received a free appropriate public education. The four factors are mostly an attempt to explain the statute's substantive standard and thus, are presumably unrelated to the procedural requirements of the IDEA. The district court accepted these factors as dispositive based upon the expert testimony in the underlying hearing of a single educator, albeit one with considerable experience in the development of educational programs for disabled children.

Id., at 253.

In *Richardson Indep. Sch. Dist. v. Michael Z,* 580 F.3d 286 (5th Cir. 2009), five years after the 2004 IDEA was in place, the Fifth Circuit noted that it had "never specified precisely how [the *Michael F.*] factors must be weighed." 580 F.3d at 293. Ignoring the 2004 amendments and relying on *Rowley,* the Fifth Circuit held that "IDEA does not require a school district to maximize a disabled child's potential. . . , [but, r]ather, it requires that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." 580 F.3d at 294 (internal quotation marks and citation omitted). In *Michael Z.*, the student only received "minimal educational benefits" during the previous school year, leading to a denial of a free appropriate public education when the school district recommended that same program for the following school year. The court

acknowledged that "absent a few isolated instances of arguable academic success, overall [the student] failed to make meaningful academic progress in the 2003–2004 school year." *Id.*, at 295. At different points, then, *Michael Z.* employs the terms "some educational benefit," more than "minimal educational benefits" and "meaningful academic progress" interchangeably. 580 F.3d at 294 (some), 295 (meaningful, minimal); see also *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 808–09 (5th Cir. 2003) ("The free appropriate public education proffered in an IEP need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction. The IDEA guarantees only a basic floor of opportunity, consisting of specialized instruction and related services which are individually designed to provide educational benefit. This educational benefit cannot be a mere modicum or *de minimis*, but must be meaningful and likely to produce progress.") (internal quotation marks and footnotes omitted).

At present, then, the Fifth Circuit, totally ignoring the 1997 amendments and the 2004 amendments of the IDEA, provides little to no concrete guidance to district courts and administrative law judges, not to mention parents and school districts, as to the substantive analysis of whether an individualized education program provides a free appropriate public education. (Notably, the *Endrew F.* court incorrectly identified the Fifth Circuit as one of three circuit that have "adopted a higher standard—requiring a 'meaningful educational benefit.' " 798 F.3d at 1339.) Development of a more concrete, measurable

standard, other than "meaningful," will aid all interested parties and decision-makers in fulfilling the purpose of the Act.

III. CONFORMING THE STANDARD FOR AN APPROPRIATE EDUCATION WITH THE INTENT AND LANGUAGE OF THE IDEA—A STANDARD OF QUALITY FOSTERING INDEPENDENCE, NOT JUST ACCESS

In contrast to *Cypress-Fairbanks*, in *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988), the Third Circuit recognized that the Act's "sponsors stressed the importance of teaching skills that would foster personal independence" in order to foster "dignity for handicapped children" and to realize "long-term financial savings of early education and assistance for handicapped children." 853 F.2d 181. "A chief selling point of the Act was that although it is penny dear, it is pound wise—the expensive individualized assistance early in life, geared toward teaching basic life skills and self-sufficiency, eventually redounds to the benefit of the public fisc as these children grow to become productive citizens." *Id.*, at 181–182. The Third Circuit found "that the emphasis on self-sufficiency indicates in some respect the quantum of benefits the legislators anticipated: they must have envisioned that significant learning would transpire in the special education classroom—enough so that citizens who would otherwise become burdens on the state would be transformed into productive members of society." *Id.*, at 182.

The *Polk* court rejected an approach essentially identical to that employed by the Tenth Circuit in *Endrew*

F., stating that "[u]nder the district court's approach, carried to its logical extreme, [the student] would be entitled to no physical therapy because his occupational therapy offers him 'some benefit.' " 853 F.2d at 184. Clearly, for a student's programming to pass muster under the Third Circuit's standard, it must address more than just one area of need.

The Sixth Circuit has also described a higher standard. *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004). The *Deal* court found that "[n]othing in *Rowley* precludes the setting of a higher standard than the provision of 'some' or 'any' educational benefit; indeed, the legislative history cited in *Rowley* provides strong support for a higher standard in a case such as this, where the difference in level of education provided can mean the difference between self-sufficiency and a life of dependence." *Id.*, at 863. Thus, "states providing no more than some educational benefit could not possibly hope to attain the lofty goals proclaimed by Congress." *Id.*, at 864. The Sixth Circuit also cautioned that "[l]eft to its own devices, a school system is likely to choose the educational option that will help it balance its budget, even if the end result of the system's indifference to a child's individual potential is a greater expense to society as a whole." *Id.*, at 864–865. That expense includes relegating children with disabilities to a lifetime of failure.

Policy makers have coined the term "school-to-prison pipeline," referring to the progression of students from school discipline to adult incarceration. See, e.g., *Texas' School-to-Prison Pipeline*, Texas Appleseed 2007.[2]

2. https://www.texasappleseed.org/sites/default/files/01-STPPReport2007.pdf

According to the U.S. Department of Education Office for Civil Rights (OCR), "[s]tudents with disabilities are more than twice as likely to receive an out-of-school suspension (13%) than students without disabilities (6%). In contrast, English learners do not receive out-of-school suspensions at disproportionately high rates (7% suspension rate, compared to 10% of student enrollment)." *Civil Rights Data Collection Data Snapshot: School Discipline,* Issue Brief No. 1 (March 2014). "Students with disabilities (served by IDEA) represent a quarter of students arrested and referred to law enforcement, even though they are only 12% of the overall student population." *Id.*

According to the Department of Justice, about 32% of prison and jail inmates report having a disability, versus 11% in the general population. Bronson, Berzofsky, *Disabilities Among Prison and Jail Inmates, 2011–12,* U.S. Department of Justice, Office of Justice Programs (December 2015). Cognitive disabilities were the most frequently reported. *Id.*, at 3.

According to the National Council on Disability, "[i]f schools provided FAPE to students with disabilities, suspensions would be the exception rather than the rule to deal with nonconforming behavior. Failing grades and lack of educational success can lead to behaviors that result in suspension." National Council on Disabilities, *Breaking the School-to-Prison Pipeline for Students with Disabilities,* June 18, 2015, at 27. A robust and concrete standard for "meaningful benefit," allowing students with disabilities to acquire the skills necessary for independent living consistent with the purpose of the IDEA, will help to end the school-to-prison pipeline.

IV. A STANDARD CONFORMING TO TODAY'S IDEA

The standard proposed by amici correlates to today's statutory definition of an individualized education program (IEP) set forth in IDEA 2004, namely (1) a statement of the child's present levels of performance, (2) measurable annual goals, (3) a description of how progress toward goals will be measured and reported, (4) special education and related services to be provided, (5) an explanation of the extent to which the child will not be educated in regular classes, (6) individual accommodations for testing. 20 U.S.C. § 1414(d)(1)(A)(i). This standard will impart substantial benefit to students with disabilities, fostering the purpose of IDEA 2004.

Assessment of Needs. The IEP development process described in the IDEA begins with a requirement that "the child is assessed in all areas of suspected disability[.]" 20 U.S.C. § 1414(b)(3)(B). It further requires the use of "assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided" and, upon completion of assessments, "the determination of . . . the educational needs of the child shall be made by a team of qualified professionals and the parent of the child[.]" 20 U.S.C. § 1414(b)(3)(C) & § 1414(b)(4)(A).

On the basis of the team's review of "existing evaluation data on the child[,]" including "evaluations and information provided by the parents of the child[,]" "current classroom-based, local, or State assessments, and classroom-based observations[,]" and "observations by teachers and related services providers[,]" the team shall

determine "the present levels of academic achievement and related developmental needs of the child[.]" 20 U.S.C. § 1414(b)(4)(B). The team must also determine "whether the child needs special education and related services" and "whether any additions or modifications to the special education and related services are needed to enable the child to meet the *measurable* annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general education curriculum." 20 U.S.C. § 1414(b)(4)(B)(iii) & (iv) (emphasis added). Evaluation of the child in all suspected areas of disability is critical to individualized educational planning and correlates to the procedural requirement that a child be evaluated in all areas of suspected disability and that the result of evaluations be used to determine the educational needs of the child. 20 U.S.C. § 1414(b)(3)(B), 1414(b)(3)(C) & 1414(b)(4)(A).

Measurable Goals to Meet Needs. A second component of substantive adequacy of the IEP should be whether measurable annual goals (and, when required, short-term objectives) address all areas of need set forth in the present levels of performance. Notably, the original version of the Education for the Handicapped Act did not require "measurable" goals but spoke only of annual goals and short-term objectives; subsequently, Congress added the term "measurable." Public Law 94-142, 89 Stat. 773, Sec. 4(a) amending Section 602 of the Act (20 U.S.C. § 1402), ¶ 19 (November 29, 1975). Today's IDEA requires measurable goals and more. Various courts have acknowledged that, regardless of the child's disability, goals for improved skills must be written in objectively measurable terms. At least two circuits, and a number of district courts, have insisted, based upon the requirement

of "measurable" goals, that school districts ensure that the child's IEP includes measurable goals that can be and are regularly measured.

For example, in *Bend-Lapine v. K.H.*, 43 IDELR 191, 234 Fed. App'x 508 (9th Cir. 2007), a hearing officer, and later the district court, found that the following types of descriptions were not a present level of performance: the child had behaviors resulting in short-term suspensions, had been physically aggressive, had difficulty maintaining friendship. The hearing officer, and later the district court, concluded that such statements were insufficient to determine an accurate baseline of the child's behaviors affected by her disability, as the IEP lacked any measurable level of problematic behaviors, numbers of suspensions, and how and in what settings the child had been verbally aggressive. The hearing officer, and later the district court, concluded that the IEP did not meet the requirements of an annual goal with benchmarks or measurable short-term objectives on reviewing certain goals. One goal was that K.H. will exhibit appropriate work ethic and behaviors in school and home 90% of the time and another said that K.H. "will apply decision, and problem solving techniques 90% of the time." The Ninth Circuit affirmed the lower court's conclusion that these goals contained ambiguous terms, and were unmeasurable and thus failed to comply with the IDEA. See also *B.H. v. West Clermont Board of Education,* 2011 WL 1575591 (S.D. Ohio 2011) (district denied appropriate education by using a behavior-intervention point system that was not shown to have a scientific basis and was inconsistently applied). District Court Judge Timothy Burgess, reviewing the education of a child in Anchorage, Alaska explained that where a child's goals were either not met

and simply eliminated from the IEP or "watered down" iterations of prior goals, and where the district failed to have any standardized means to measure the child's progress, the child regressed and was nearly retained. *Anchorage School District v. D.K.*, 54 IDELR 28, 3:08-cv-00031, 2009 U.S. Dist. LEXIS 125319, at *1 (D.Ak. 2009). Judge Burgess reasoned that the child had been denied a free appropriate public education because the IEP goals were vague and not measurable and the child was not progressing.

The Sixth Circuit has agreed that, because the evaluation of a student's progress is so closely tied to the student's IEP goals, the district must ensure that the goals included in each IEP are "clear and objectively measurable." *Kuszewski v. Chippewa Valley Schs.*, 34 IDELR 59 (E.D. Mich. 2001) aff'd 38 IDELR 63 (6th Cir. 2003). As a state-level administrative officer has noted, IEP goals should pass the stranger test, namely, if a stranger can implement it and measure using it and determine progress, then the IEP goal is appropriate. *Mason City Cmt. Sch. Dist.*, 46 IDELR 148 (SEA IA 2006); *Bridges v. Spartanburg County Sch. Dist. Two*, 57 IDELR 128 (D.S.C. 2011) (goals must be objectively measurable, such as the use of percentages tied to the completion of discrete tasks to measure student progress). A finding that a child's goals are vague or immeasurable generally leads to a ruling that the district denied FAPE. See, e.g., *Independent Sch. Dist. No. 701 v. J.T.* 45 IDELR 92 (D.Minn. 2006) (an IEP's statement that a student would "improve his functional academic skills from a level of not completing assignments independently to a level of being able to read, write and do basic math skills independently" was too vague to permit measurement of

the student's progress); *Anchorage Sch. Dist.*, 51 IDELR 230 (SEA AK 2008) aff'd 54 IDELR 29 (D.Alaska 2009) (finding by IHO that the lack of clear, measurable goals in a child's IEP precluded an objective measurement of the child's progress).

Furthermore, are the goals "S.M.A.R.T"; namely, are they specific, measurable, attainable, relevant and time-related? See Doran, Miller, Cunningham, "There's a S.M.A.R.T. way to write management's goals and objectives," *Management Review,* (vol. 70, issue 11, 1981); and see Telfer, D.M. (2011). *Moving your numbers: Five districts share how they used assessment and accountability to increase performance for students with disabilities as part of district-wide improvement.* Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes, at 21. This correlates with the procedural requirement that an IEP include "a statement of *measurable* annual goals, including academic and functional goals, designed to [] meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and [] meet each of the child's other educational needs that result from the child's disability[.]" 20 U.S.C. § 1414(d)(1)(A)(i)(II) (emphasis added).

Thus, the Court should also clarify, consistent with footnote 25 of the *Rowley* decision, and with at least two circuits and various district courts, that measurement of a child's progress and receipt of a free appropriate public education cannot be primarily by classroom grades alone (especially modified grades). The Court should soundly reject the Fifth Circuit's erroneous view in *Klein Independent School District v. Hovem,* 690 F.3d 390 (5th

Cir. 2012), relying upon *Cypress-Fairbanks*, that passing grades are "good enough." Rather, the child's progress should be based upon whether the child's IEP contains measurable annual goals and the child's progress toward those goals is objectively measured. The Court should reject, as Judge Stewart did, dissenting in *Hovem*, that the purpose of the IDEA is simply "social promotion." *Id.*, at 408 ("Clearly, social promotion of disabled students in the general curriculum, even if well-meaning, is inadequate to meet this mandate, both according to our established precedents and the plain language of the IDEA"). Notably, in *Rowley*, this Court noted that the child involved was performing above average in a regular education classroom. *Rowley*, 458 U.S. at 202–203. Grades are subjective by nature, and the teacher's use of them is not based upon peer-reviewed research, especially when the child is being educated primarily in a special education classroom. The Third Circuit has explained in *D.S. v. Bayonne*, 602 F.3d 553, at 567–568, (3rd Cir. 2010) that a child was denied a free appropriate public education despite "A's" in a special education classroom.

Special Education and provided in each area of identified need and Related Services that are Research-Based. A third component the Court must address is whether special education and related services provided to remediate each identified area of need via specialized instruction, and, fourth, whether research-based methodologies are being prescribed by the IEP "to the extent practicable[]"? 20 U.S.C. § 1414(d)(1)(A)(i)(IV). Clearly Congress, in stressing the importance of "the special education and related services and supplementary aids and services" being "based on peer-reviewed research to the extent practicable[,]" intended that the

child's needs, as identified by evaluations, be addressed through research-based methods. 20 U.S.C. § 1414(d)(1)(A)(i)(IV). A program can hardly be "reasonably calculated" to impart substantial benefit if it fails to employ available methods that are based upon peer-reviewed research.

The Court should instruct the lower courts to include as a factor whether or not peer-reviewed research is available and if so, whether it is used by the school district to instruct the child so that children with disabilities receive an education that is consistent with the IDEA's mandate of measurability and peer-reviewed research, if available. Such research is often available and it is practicable to use it. "Peer-reviewed research" generally refers to research that is reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before the research is published. 71 F.R. 46664 (but declining to adopt a more specific definition). Peer-reviewed research establishes that, for children with autism, the use of Applied Behavioral Analysis ("ABA") can improve their communication, academics and social skills; ABA can be provided in school. Ronald Leaf, Ph.D., Mitchell Taubman, Ph.D., & John McEachin, Ph.D., "It's Time for School! Building Quality ABA Educational Programs for Students with Autism Spectrum Disorders" (2008 Autism Partnership). Some Texas hearing officers have recognized the importance of ABA and ordered that it be provided. *Silsbee Indep. Sch. Dist.*, Tx Case 268-59-0709; *Tyler Sch. Dist.*, Tx Case 347-59-0812; *Beaumont Sch. Dist.*, Tx Case 296-59-0710; *Beaumont Sch. Dist.*, Tx Case 205-53-0413; *T.T. v. Beaumont Sch. Dist.*, Tx Case 162-SE-0214. The Fifth Circuit, however, has never addressed the importance of peer-reviewed research, such

as ABA services for children with autism, and has never formulated a requirement that IEPs specify research-based methods.

Similarly, research-based approaches are available for children with learning disabilities or dyslexia. Louisa C. Moats, Karen E. Dakin and R. Malatesha Joshi, "Expert Perspectives on Interventions for Reading: A Collection of Best Practice Articles from the International Dyslexia Association," (2012 International Dyslexia Association). More peer-reviewed research about the hallmarks of strong reading programs to help children with ADHD and dyslexia improve reading skills emerged three years after *Cypress-Fairbanks*, after the National Reading Panel released its findings in April of 2000. See "Report of the National Reading Panel, Teaching Children to Read: An Evidence-Based Assessment of the Scientific Research Literature on Reading and Its Implications for Reading Instruction," www.nichd.nih.gov. Experts on the Reading Panel explained that for reading programs to be effective they must include such elements as phonemic awareness, phonics taught systemically and explicitly, spelling, sight words, and others. Shaywitz, at 208–210; and see, e.g., *E.S. v. Independent School District No. 196*, 135 F.3d 566, n. 3 (8th Cir. 1998) (noting one type of reading instruction, Orton-Gillingham, is an approach to teaching children with learning disabilities but declining to order same). *Cypress-Fairbanks* does not require that peer-reviewed research-based programs be offered to children with dyslexia when practicable.

Likewise, we currently have an improved understanding in how to provide positive behavioral supports for children with ADHD, some of whom have behavioral problems.

Technical training and assistance is available to schools to increase their ability to establish effective behavioral supports for children with disabilities, including those with ADHD. This Court affirmed the need for districts to provide behavioral services for children in 1988 in *Honig v. Doe.* In August of 2016, the United States Department of Education, Office of Special Education Programs (OSEP) and the Office of Special Education and Rehabilitation Services (OSERS) issued a Dear Colleague Letter to the states recognizing that students on IEPs may need changes and improvements to their programs to address behavioral issues. *Dear Colleague Letter*, 68 IDELR 176 (OSEP/OSERS, August 1, 2016). In the 2004 amendments, Congress mandated that IEP teams consider the child's need for behavioral services. 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) (in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior). But again, the *Cypress-Fairbanks* analysis is devoid of this factor and does not indicate how the reviewing court is to determine whether the IEP is providing such services.

While the *Cypress-Fairbanks* standard includes a "non-academic" component, it has not kept pace with two key indicators of that standard. Research is also more readily available concerning bullying than it was prior to 2004. We now have a better understanding of bullying; we know that if a child with disabilities is bullied, it impacts his learning and as such may cause a denial of a FAPE. At least three circuits, but not the Fifth, have explained that bullying can result in a denial of a free appropriate public education. *Shore Regional High School Board of Education v. P.S.*, 41 IDELR 234 (3rd Cir. 2004); *M.L.*

v. Federal Way School District, 394 F.3d 634 (9th Cir. 2005); *Board of Education of Skokie School District 68*, 24 IDELR 1039 (7th Cir. 1996); *T.K. and S.K. v. New York City Department of Education*, 116 LRP 2393 (2nd Cir. 2016). The United States Department of Education has issued opinion letters cautioning school districts to protect children with disabilities from bullying. *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013); *Dear Colleague Letter*, 64 IDELR 115 (OSERS/OSEP 2014).

Rowley was decided in 1982, before the advent of the Internet, and during the infancy of assistive technology. Now, technology is a part of our everyday lives and it is a part of the IDEA. 20 U.S.C. § 1401(1), (2), and 1414(d)(3)(B)(v); 34 C.F.R. § 300.5, 34 C.F.R. § 300.6; 300.324(a)(2)(V). Peer-reviewed research on the use of assistive technology is now available. See Autism Speaks Amicus Brief on Petition for Certiorari, at 21–22.

Following the 2004 reauthorization of IDEA, the new regulations also included specific references that IEP teams had to specifically discuss how students with disabilities could participate in extracurricular and other nonacademic activities. 20 U.S.C. § 1412(a)(1); 34 C.F.R. § 300.107 provides: "Each public agency must take steps . . . to provide nonacademic and extracurricular services and activities . . . to afford children with disabilities an equal opportunity for participation in those services and activities." See also *Dear Colleague Letter*, 60 IDELR 67 (OCR 2013). A review of the research and the statutory and regulatory changes leaves no doubt that all of this peer reviewed research about ABA, reading programs for children with dyslexia, behavioral programs for children

with ADHD, assistive technology, bullying research and information about extra-curricular activities is available research necessary for schools to use when creating programs for children with the disabilities and is uniquely, specifically and clearly tied to the IDEA's statutory dictates that schools use "peer-reviewed research, if available."

Learning while remediating. Finally, fifth, are sufficient modifications, accommodations, and technologies offered to allow the student to progress in the regular curriculum, at grade level, in spite of the deficits due to disability, while the deficits are being remediated? A guidance memorandum from the U.S. Department of Education illustrates how a FAPE could be delivered to a child with a specific reading disability:

> For example, after reviewing recent evaluation data for a sixth grade child with a specific learning disability, the IEP Team determines that the child is reading four grade levels below his current grade; however, his listening comprehension is on grade level. The child's general education teacher and special education teacher also note that when materials are read aloud to the child he is able to understand grade-level content. Based on these present levels of performance and the child's individual strengths and weaknesses, the IEP Team determines he should receive specialized instruction to improve his reading fluency. Based on the child's rate of growth during the previous school year, the IEP Team estimates that with appropriate specialized instruction

> the child could achieve an increase of at least 1.5 grade levels in reading fluency. To ensure the child can learn material based on sixth grade content standards (e.g., science and history content), the IEP Team determines the child should receive modifications for all grade-level reading assignments. His reading assignments would be based on sixth grade content but would be shortened to assist with reading fatigue resulting from his disability. In addition, he would be provided with audio text books and electronic versions of longer reading assignments that he can access through synthetic speech. With this specialized instruction and these support services, the IEP would be designed to enable the child to be involved and make progress in the general education curriculum based on the State's sixth grade content standards, while still addressing the child's needs based on the child's present levels of performance.

Dear Colleague Letter, U.S. Department of Education, (OSERS November 16, 2015). This example program is reasonably calculated to allow a child to make progress in the sixth-grade regular curriculum, through program modifications and assistive technology, while making progress in remediating his deficits in reading, through specialized instruction.

Application of the Tenth Circuit's standard to this example child would permit programming that completely ignores the student's improving reading in a measurable way, so long as the child can make "some progress"

toward learning a single academic subject at grade level through the use of modifications or accommodations and sit through the sixth grade science and history classes. The student's programming could focus on ensuring the student makes progress in a relative areas of strength (for example, math) while completely neglecting the student's deficit areas. The IDEA requires instruction that meets the child's disability-related needs to facilitate access to the general education curriculum, and to remediate other deficits arising from the disability. 20 U.S.C. § 1414(d)(1)(A)(i)(II)

The Court should adopt a substantive standard for FAPE effectively addressing the following inquiries:

1. Has the child been evaluated in all suspected area of disability and do the present levels of performance reflect the results of all evaluations so as to result in individualized planning?

2. Do the annual goals (and, when required, short-term objectives) address all areas of need set forth in the present levels of performance?

3. Are special education and related services provided to remediate each identified area of need via specialized instruction?

4. Are research-based methodologies being prescribed by the IEP to the extent practicable?

5. Are sufficient modifications, accommodations, and technologies offered to allow the student to progress in the regular curriculum, at grade level,

in spite of the deficits due to disability, while the deficits are being remediated through specialized instruction?

Once a court has answered these questions, it may inquire whether the services are being delivered in the least restrictive environment. See, e.g., *Oberti v. Clementon Sch. Dist.*, 995 F.2d 1204, 1215 (3rd Cir. 1993) (two-pronged test for least restrictive environment).

CONCLUSION

Based on the foregoing, amici curiae respectfully request that the Court reverse the decision of the Tenth Circuit and remand for further proceedings consistent with the guidelines suggested in this brief and ensuring that children with disabilities in the Fifth Circuit are no longer subject to the outdated *Cypress-Fairbanks v. Michael F.* standard.

Dated: Auburn, New York November 21, 2016

Respectfully submitted,

SONJA D. KERR
CUDDY LAW FIRM, PLLC
DIRECTOR OF IMPACT LITIGATION
8723 Shoal Creek Boulevard
Austin, Texas 78757
(512) 649-3191

ANDREW K. CUDDY
Counsel of Record
JASON H. STERNE
CUDDY LAW FIRM, PLLC
5693 South Street Road
Auburn, New York 13021
(315) 370-4020
acuddy@cuddylawfirm.com

Counsel for Amici Curiae

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ENDREW F., A MINOR,
BY AND THROUGH HIS PARENTS AND NEXT
FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* COLORADO STATE BOARD OF EDUCATION AND COLORADO DEPARTMENT OF EDUCATION IN SUPPORT OF THE RESPONDENT

CYNTHIA H. COFFMAN
Attorney General

FREDERICK R. YARGER
Solicitor General
Counsel of Record

GLENN E. ROPER
Deputy Solicitor General

JULIE C. TOLLESON
First Assistant Attorney General

Office of the Colorado Attorney General
1300 Broadway
10th Floor
Denver, Colorado 80203
Fred.Yarger@coag.gov
(720) 508-6186

Counsel for Amici Curiae Colorado State Board of Education and Colorado Department of Education

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*?

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INTEREST OF *AMICI CURIAE*

The Colorado State Board of Education is an elected body entrusted with the general supervision of Colorado's public schools pursuant to the State Constitution. COLO. CONST. Art. IX § 1(1). As part of its responsibilities, the Board creates statewide education policy, including by crafting rules for administering state special education programs. It is governed in part by Colorado's Exceptional Children's Educational Act, COLO. REV. STAT. §§ 22-20-101 to -206, and its accompanying rules, which both incorporate by reference and expand upon the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–82, and its implementing regulations. *See* 1 COLO. CODE REGS. § 301-8. The state rules also define the term Free Appropriate Public Education (FAPE) and specify IDEA-aligned requirements for the development and revision of Individualized Education Programs (IEPs). *Id.* § 301-8(2.19) & (4.03). Colorado special education law also includes requirements beyond those of IDEA.[1]

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[1] For example, Colorado requires that: 1) IEPs specify whether the child will achieve district, local, or charter school institute standards, or instead achieve individualized standards, COLO. REV. STAT. §22-20-108(4); 2) for a child who is visually impaired, the IEP team must consider specified factors and adopt a literacy modality plan, *id.* §22-20-108(4.5)(a); 3) for a child who is deaf, the IEP team must consider specified factors and address the child's communication needs, *id.* §22-20-108(4.7); 4) the IEP requirement for transition services begins when the child either is 15 years old or completes ninth grade, 1 COLO. CODE REGS. § 301-8(4.03)(6)(d)(i); and 5) the special education director or designee is not only a required IEP team member, but may not be excused from participation. *Id.* § 301-8(4.03)(5)(b).

The Colorado Department of Education is the state agency responsible for implementing state K-12 education efforts. *See generally* COLO. REV. STAT. § 24-14-115 (creating the Department); *id.* §§ 22-1-101 to 22-96-105 (Colorado Education Code). The Department operates under the leadership of the Board-appointed Commissioner of Education and serves as the State Educational Agency (SEA), as defined by 34 C.F.R. § 300.41, responsible for administering federally funded education programs in Colorado.

The Department's administration of IDEA has three main elements. First, the Department's Office of Special Education oversees statewide IDEA compliance. Its staff provides technical assistance to districts and charter schools, conducts professional development for teachers, and maintains a public website with information and resources for both families and educators.

Second, the Department handles disputes and complaints under IDEA. Through the Department's dispute resolution program, trained mediators facilitate meetings between schools and families with disabled children. The Department also has a complaints process as required under IDEA rules, 34 C.F.R. § 300.151.[2] Any organization or individual alleging a violation of IDEA Part B may file a complaint with the Department. State Complaints Officers—all of whom are licensed attorneys—review these complaints, conduct investigations as needed,

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[2] The Department's *State Level Complaint Procedures* were most recently revised in 2010 and are available at http://tinyurl.com/hp4ze9g.

and issue written decisions. If a school has substantially failed to comply with IDEA, the State Complaints Officer may direct remedial action and award appropriate remedies. 34 C.F.R. § 300.151(b).

Third, parents and school districts may request a due process hearing conducted by a Department administrative law judge. In a due process hearing, the parties present evidence and legal arguments, and the ALJ issues findings of fact and conclusions of law and may order remedies for any violations of IDEA. 34 C.F.R. § 300.511–515. Parties aggrieved by the decision of an ALJ may then challenge that decision by bringing a civil action in state or federal court. 34 C.F.R. § 300.516.

Given their responsibilities under both IDEA and Colorado law, the Board and the Department have a keen interest in the standard that courts use in evaluating the sufficiency of an IEP under the IDEA. *Amici* take seriously their central role in the federally funded, state-designed system of data-driven accountability and continuous school improvement. But that system should not be invoked to create a new standard for IEP development divorced from any language in the IDEA.

STATEMENT

This case involves two distinct yet interrelated legal frameworks for which the *amici* bear fiscal and administrative responsibility: the IDEA and the Elementary and Secondary Education Act (ESEA), 20 U.S.C. §§ 6301–7974. Both the IDEA and the ESEA are Spending Clause statutes. That is, in exchange for federal funds, the Department takes on supervision and oversight roles under terms specified by law. *See, e.g.*, 20 U.S.C. § 7842 (requirements regarding state and local plans and applications).

Both statutes have an important place in the legal architecture of public education, but they should not be conflated. At the heart of IDEA is the IEP: specialized educational programming designed to meet an individual student's needs. *See Honig v. Doe*, 484 U.S. 305, 310–11 (1988). In contrast, ESEA establishes a system for school accountability and improvement that seeks to raise the bar for all student groups. These two prongs of federal education policy are complementary: the IEP requirement ensures that schools meet the individualized needs of students with disabilities, while the school accountability system helps States provide targeted support to schools and districts on a data-driven basis. Petitioner blurs the line between these two distinct statutes by suggesting that amendments to ESEA altered the judicial review standard for individual FAPE claims under IDEA. Pet. Br. 28.

Background and evolution of the ESEA. The ESEA was signed into law in 1965 and is at the center of federal education policy. It is a funding statute that has been repeatedly reauthorized by Congress, sometimes with sweeping amendments. Over the years,

ESEA has evolved beyond its original emphasis on low-income students and communities into a roadmap for state-driven school improvement.

To receive federal funding under ESEA, States must craft and submit a Plan. 20 U.S.C. § 6311. Among other things, the State Plan allows for both data-driven school-by-school ratings and a demographic analysis of student performance based on a statewide assessment. Each State Plan must ensure that a number of different subgroups—including traditionally overlooked students such as racial minorities, special education students, English-language learners, and low-income populations—are making academic progress. The States must monitor the performance of each subgroup separately. For example, under ESEA, schools and districts must review results on annual tests both by the student population as a whole and by various "subgroups" of students, including students with disabilities. *Id.* § 6311(b)(2)(B)(xi).

Statewide accountability systems must be based on "academic content standards" that specify what students should know and be able to do. *Id.* § 6311(b); 34 C.F.R. § 200.1(b)(1)(i). States must also adopt "academic achievement standards" that are aligned with the content standards. 20 U.S.C. § 6311(b); 34 C.F.R. § 200.1(c)(1)(i). Tests must be aligned to those "challenging academic content standards and challenging student academic achievement standards," and those standards must apply to *all* schools and *all* children. 20 U.S.C. § 6311(b)(2)(B)(i).

The ESEA mandate for annual assessments that are aligned to challenging academic expectations grew out of the standards-based reform movement that took

hold in the 1980s and 1990s.[3] In 1994, that movement led to significant revision of the ESEA by the Improving America's Schools Act (IASA), Pub. L. No. 103-382, 108 Stat. 3518 (1994). The IASA's statement of purpose noted the "particularly great" needs of "children in our Nation's highest-poverty schools, children with limited English proficiency, children of migrant workers, children with disabilities, Indian children, children who are neglected or delinquent, and young children and their parents who are in need of family-literacy services." *Id.* § 1001(b)(3). All children, Congress declared, can master challenging content. *Id.* § 1001(c)(1). IASA therefore required math and language arts standards to be used as accountability measures in state tests. *Id.* § 1111(3).

The standards-based reform movement made its most visible mark with the 2001 reauthorization of ESEA, also known as the No Child Left Behind Act (NCLB), Pub. L. No. 107-110, 115 Stat. 1425 (2002).[4] As this Court noted in *Horne v. Flores*, NCLB sought to "raise the level of education nationwide" by, among

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[3] *See, e.g.*, Natalie Gomez-Velez, *Public School Governance and Democracy: Does Public Participation Matter?* 53 VILL. L. REV. 297, 306 (2008).

[4] *See* Lauren B. Resnick et al., *Standards-Based Reform: A Powerful Idea Unmoored, in Improving on No Child Left Behind* 103 (Richard D. Kahlenberg ed., 2008) ("No Child Left Behind is the current expression of a twenty-year drive to use a 'standards strategy' to steer American education toward higher levels of achievement and greater equity."); *see also Broken Systems, Broken Duties: A New Theory For School Finance Litigation*, 94 MARQ. L. REV. 1195, 1197 (Summer 2001) (NCLB "brought the concept of standards-based reform to center stage").

other things, "requiring States receiving federal funds to define performance standards and to make regular assessments of progress toward the attainment of those standards." 557 U.S. 433, 461 (2009). No longer could tepid expectations or poor progress for any subgroup be obscured by school-wide or district-wide averages. Instead, SEAs like the Department were tasked with reviewing disaggregated data to ensure that each subgroup is progressing towards proficiency. Pub. L. No. 107-110 § 1111(h)(1)(C). NCLB's original goal was that all students—including those in the various subgroups—would achieve proficiency by 2013-14, although that ambitious target was subsequently revised.[5]

ESEA thus evolved to function as a comprehensive, national, integrated school improvement system. When a State submits its Plan in exchange for ESEA funding, that Plan must coordinate the expectations of approximately a dozen federal statutes, including IDEA. 20 U.S.C. § 6311(a)(1)(B).[6] Under the changes

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[5] When it became clear that an overwhelming majority of school districts were not going to meet this goal, the United States Department of Education began to waive it in exchange for states agreeing to certain conditions. *See* Derek W. Black, *Federalizing Education by Waiver?* 68 VAND. L. REV. 607, 613–14 (2015).

[6] Other programs that must be coordinated in a State plan include: the Rehabilitation Act of 1973 (20 U.S.C. §§ 701 *et seq.*), the Carl D. Perkins Career and Technical Education Act of 2006 (20 U.S.C. §§ 2301 *et seq.*), the Workforce Innovation and Opportunity Act (29 U.S.C. §§ 3101 *et seq.*), the Head Start Act (42 U.S.C. §§ 9831 *et seq.*), the Child Care and Development Block Grant Act of 1990 (42 U.S.C. §§ 9858 *et seq.*), the Education Sciences Reform Act of 2002 (20 U.S.C. §§ 9501 *et seq.*), the Education Technical Assistance Act

implemented through NCLB and successive legislation, federally funded educational programs are thus intended to raise the bar for *all* students and subgroups. The details of the process, however, are entrusted to the States.

Background and implementation of the IDEA. In contrast to ESEA's systemic focus, the primary goal of the IDEA is to provide a FAPE to individual students with disabilities. As this Court noted in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, at the time the Act was adopted, Congress found that nearly one million students with disabilities were excluded from public school outright, while over half of the nation's disabled students were "receiving an inappropriate education." 458 U.S. 176, 189 (1982) (citing 89 Stat. 774, note following § 1401). Thus, at its inception, IDEA was designed to provide access to the schoolhouse for students who were excluded outright, along with a basic floor of educational opportunity. *Id.* at 198–200. This access was then to be made meaningful through "specially designed instruction" and associated services. *Id.* at 201; *see also* 20 U.S.C. § 1401. The centerpiece of the IDEA's promise of a FAPE to students with disabilities is the IEP.

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of 2002 (20 U.S.C. §§ 9601 *et. seq.*), the National Assessment of Educational Progress Authorization Act (20 U.S.C. §§ 9621 *et seq.*), the McKinney-Vento Homeless Assistance Act (42 U.S.C. §§ 11301 *et seq.*), and the Adult Education and Family Literacy Act (29 U.S.C. §§ 3271 *et seq.*).

Prior to 1990, IDEA (then the Education of the Handicapped Act)[7] emphasized the right of individual students to educational access and appropriate services through an IEP. *See* Pub. L. No. 94-142 §3(c), 89 Stat. 773 ("It is the purpose of this Act to assure that all handicapped children have available to them within the time periods specified in section 612(2)(B), a free appropriate education which emphasizes special education and related services defined to meet their unique needs."). The 1975 Act mandated a written IEP for all disabled students with specific content requirements. It likewise obligated SEAs to establish "guaranteed procedural safeguards," including a complaint process and hearing rights. *Id.* § 615.

Subsequent amendments to IDEA not only expanded IEP requirements for individual students, but also added elements of standards-based reform and data-driven accountability. Many of those changes mirror the evolution of the ESEA's expectations for State Plans. In 1997, for example, Congress found that IDEA implementation had "been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." IDEA Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997). This language echoed Congressional findings in the 1994 ESEA reauthorization: "Research clearly shows that children, including low achieving children,

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[7] The Education of All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773, was adopted in 1975. It was reauthorized in 1990, at which time it was renamed the Individuals with Disabilities Education Act. *See* Pub. L. No. 101-476, 104 Stat. 1142.

can succeed when expectations are high and all children are given the opportunity to learn challenging material." Improving America's Schools Act of 1994, Pub. L. No. 103-382 §1001, 108 Stat. 3518 (1994).

Building on the groundwork of IASA, the 1997 IDEA revisions added a requirement of performance goals and indicators, and required that students with disabilities be included in state assessments. IDEA Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997); *see also Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 240 (2007) (stating that the 1997 amendments were "intended to place greater emphasis on improving student performance") (quoting S. Rep. No. 105-17, at 5 (1997)).

The 2004 IDEA amendments again included both provisions designed to benefit individual students as well as revisions aligned with NCLB accountability. For individual students, among other things the 2004 amendments expanded the requirements for transition services.[8] To drive systemic change, IDEA 2004 provided for enhanced State efforts on "improving educational results and functional outcomes for all children with disabilities" and gave the United States Department of Education more enforcement options. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 616, 118 Stat.

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[8] Under IDEA 2004, the first IEP created after the child is sixteen must include post-secondary goals based on age-appropriate transition assessments and should identify the services the student needs to reach those goals. Individuals with Disabilities Education Improvement Act of 2004, 108 Pub. L. No. 446, 113 Stat. 2647 (2004) ("IDEA 2004").

2734–36 (2004). States receiving IDEA funds submit State Performance Plans (SPPs) to the United States Department of Education's Office of Special Education Programs (OSEP). 20 U.S.C. § 1416(b)(1)(A).

In July 2013, OSEP announced a change in which the SPP model would integrate outcomes data into the compliance monitoring that was the hallmark of SPP reporting. Starting in 2013-14, districts and BOCES[9] would receive both compliance scores (based on IDEA procedural compliance data) and outcome scores (based on assessment results). This system of "Results Driven Accountability" would include, for example, scores reflecting the percentage of students with disabilities who score at a basic level or above on the National Assessment of Educational Progress. The SPP must also include a State Systemic Improvement Plan (SSIP) that is specifically focused on improving achievement outcomes for students with disabilities.[10] Like ESEA,

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[9] Generally, primary responsibility for providing educational services to students with disabilities is entrusted to school districts, which function as Local Education Agencies under federal law. However, some smaller Colorado school districts have joined to create boards of cooperative education services (BOCES) that oversee and implement special education programs. Colorado uses the term "Administrative Unit" to refer to the legal entity (school district, BOCES, or state Charter School Institute) that bears fiscal and administrative responsibility for special education services. COLO. REV. STAT. §§22-20-103(1), 106(1).

[10] Colorado submitted its SSIP to the United States Department of Education in April of 2015. *See* Colo. Dep't of Educ., State Systemic Improvement Plan Phase 1 (April 1, 2015), http://tinyurl.com/hdnb9o6; *see also* Colo. Dep't of Educ., State Systemic Improvement Plan Phase 2 (April 1, 2016), http://tinyurl.com/zvrc87x.

IDEA thus now specifies certain requirements designed to drive systemic improvement at the State level.

In contrast to the substantial changes in data reporting, in the years since this Court decided *Rowley*, the statute's FAPE definition remains untouched, although Congress has expanded some procedural and substantive IEP requirements. *See, e.g.*, Resp. Br. 5. The evolution of IDEA thus reflects more than ever "the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley*, 458 U.S. at 206.

SUMMARY OF ARGUMENT

In an attempted end-run around *stare decisis*, Petitioner incorrectly suggests that the IDEA's definition of a FAPE was implicitly modified by the federal trend towards standards-based accountability. Petitioner blurs the lines between two distinct statutory functions by suggesting that amendments to ESEA altered the judicial review standard for individual FAPE claims under IDEA. There is a process to hold schools and districts responsible for failure to meet the expectations of standards-aligned accountability, but it is not through individual student IDEA litigation. Moreover, because IDEA is a funding statute, its conditions must be expressed unambiguously. The legislative history of amendments to ESEA and IDEA is now, just as it was in 1982, "too thin a reed on which to base an interpretation of the Act." *Id.* at 204 n.29.

Petitioner suggests that without judicial intervention, students with disabilities in Colorado and elsewhere in the Tenth Circuit will receive a lesser education than those in other places. Petitioner's charge ignores that the content of academic standards is entrusted to the States, and Colorado has adopted ambitious and comprehensive standards that are entitled to deference.

Petitioner and the Federal Government seek to revise this Court's requirement that an IEP be developed in accordance with the IDEA's procedural requirements and be "reasonably calculated to enable the child to receive educational benefits," *Id.* at 207, by inserting various adjectives. Neither proposal will fundamentally change the IEP process and content requirements, but each adds an ambiguity to IEP scrutiny that leaves the process fundamentally unworkable. Moreover, Petitioner's hindsight focus on educational outcomes to assess IEP sufficiency is misplaced. Determining whether an IEP is "reasonably calculated" is an *ex ante* judgment, not an *ex post* exercise. The *Rowley* standard should remain intact.

ARGUMENT

I. IDEA is part of a body of education funding statutes that work in concert, that can only impose duties unambiguously, and that entrust the details of implementation to the States.

A. The IDEA must be understood within the larger context of federal education policy.

The ESEA forms the core of federal education policy, but Congress has also passed a number of laws targeting student populations with particularized needs. Some of those laws have been incorporated directly into ESEA—for example, the 1968 Bilingual Education Act became Title VII of ESEA. Pub. L. No. 90-247 §§ 701–07, 81 Stat. 783 (1968). Other statutes are codified separately. In 1975, Congress adopted the Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975), which later became the IDEA, Pub. L. No. 101-476, 104 Stat. 1103 (1990). Subtitle B of 1987's Stewart B. McKinney Homeless Assistance Act targets educational programming for homeless children. *See* Pub. L. No. 100-77, §§ 721–25, 101 Stat. 482, 525–28 (1987) (codified at 42 U.S.C. § 11431–35). State Educational Agencies like the Department must develop a State Plan that "coordinate[s]" the mandates of a number of federal statutes, including the IDEA. *See* 20 U.S.C. § 6311(a)(1)(B).

Petitioner cites the 2004 amendments to the IDEA as evidence for the claim that school district obligations to students with disabilities are different than they

were at the time this Court decided *Rowley*. Pet. Br. 39. This misunderstands the paradigm shift of NCLB.

Students with disabilities were but one of a number of subgroups who were underperforming (that is, "left behind") at the time NCLB was enacted and who Congress intended to assist. For example, English language learners were targeted by NCLB provisions that added the English Language Acquisition, Language Enhancement, and Academic Achievement Act to Title III of the ESEA. Pub. L. No. 107-110, §§ 3101–11, 115 Stat. 1425, 1609 (2002) (codified at 20 U.S.C. §§ 6811–94). Those provisions required States to ensure that such students "attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet." 20 U.S.C. § 6812(1) (2002). Other provisions likewise targeted "children and youth in local, tribal, and State institutions for neglected or delinquent children and youth" so that those students would "have the opportunity to meet the same challenging State academic standards" as their peers. Pub. L. No. 107-110, § 1401(a)(1), 115 Stat. 1425 (2002) (codified at 20 U.S.C. § 6421(a)(1)). Similar language was added regarding education for homeless children. *Id.* § 721 (requiring that State plans describe how homeless children "will be given the opportunity to meet the same challenging state academic standards all students are expected to meet").

Contrary to Petitioner's argument, the notion that the NCLB's standards-based accountability implicitly amended IDEA in ways not specified by Congress is untenable. NCLB raised standards, but the idea that

high standards and data-driven accountability mean something different for students with disabilities than for other subgroups cannot be reconciled with the letter or spirit of ESEA.

B. Courts cannot infer an amendment to IDEA; Congress must speak unambiguously.

IDEA is a funding statute rooted in "cooperative federalism." *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49, 52 (2005). It leaves to the States "the primary responsibility for developing and executing educational programs" for disabled students, although it "imposes significant requirements to be followed in the discharge of that responsibility." *Rowley*, 458 U.S. at 183. Because it is a funding statute, the Act cannot "impose [a] burden upon the States unless [Congress] does so unambiguously." *Id.* at 190 n.11.

Congress has not done so as to the IDEA. That statute defines a FAPE as "special education and related services that (A) have been provided at public expense under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under [20 U.S.C. § 1414(d)]." 20 U.S.C. § 1401(9). As this Court noted in *Rowley*, the definition functions "[a]lmost as a checklist for adequacy under the Act." 458 U.S. at 189.

That "checklist" has never been amended. This Court held in *Rowley* that any substantive standard describing the level of education required for disabled students was "[n]oticeably absent" from the statute. *Id.* Congress was presumed to be aware of this holding when it reauthorized and amended IDEA in 1997 and 2004. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."). Absent clear action by Congress, there is no basis for reading new terms into the statute.

Although Petitioner contends that post-*Rowley* amendments to IDEA gave rise to a substantive standard that did not exist when that case was decided, he cites no specific Congressional action in support of the argument. Rather, he suggests that an enhanced level of "educational benefits" is *implied* by the infusion of standards-based reform into ESEA. Pet. Br. 26–29. Such an implication—even if it existed—is insufficient under a federal funding statute. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (holding that IDEA did not "furnish[ ] clear notice" that one of the obligations of the Act "is the obligation to compensate prevailing parents for expert fees"); *Rowley*, 458 U.S. at 204 n.26.

This case thus meaningfully differs from *West v. Gibson*, 527 U.S. 212 (1999), which Petitioner cites for the proposition that amendments to 42 U.S.C. § 1981 implicitly gave the EEOC authority to award compensatory damages as an "appropriate" remedy under Title VII of the Civil Rights Act of 1964. Pet. Br.

35. Title VII is not a funding statute, but was adopted under Congress' Commerce Clause authority. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (concluding that the Commerce Clause provides Congress with authority to enact provisions of the Civil Rights Act of 1964). *Gibson* thus is of no relevance where Congress' exercise of authority is under the Spending Clause. *Cf. Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16–18 (1981) (explaining the difference between a civil rights statute enacted under § 5 of the Fourteenth Amendment and one reflecting the terms of a "contract" for the receipt of funds).

Nor can the Petitioner or the Federal Government properly find an implied amendment in carefully selected statements from legislative history. *See, e.g.*, Pet. Br. 28–29; U.S. Amicus Br. 21–23. Just as such statements were "too thin a reed on which to base interpretation of the Act" in 1982, *Rowley*, 458 U.S. at 204 n.26, they are insufficient here. Congress' clear choice to leave the statutory definition of a FAPE untouched speaks louder than the aspirational remarks of individual legislators.

C. Educational standards-setting is entrusted to State governments and managed through accountability systems, not lawsuits.

It is axiomatic that the details of educational policy are reserved to State governments under the Tenth Amendment, and public education is a state and local function, even when partially funded using federal funds that impose general conditions. The Federal Government contends that absent court intervention, Colorado school districts will essentially be "told that it is perfectly fine to aim low." U.S. Amicus Br. 36. But

it is the States, not Congress or the courts, that develop and implement specific standards. As this Court noted in *Rowley*, "Congress' intention was not that the Act displace the primacy of States in the field of education but that States receive funds to assist them in extending their educational systems to the handicapped." *Rowley*, 458 U.S. at 208.

Nor is there any evidence that Colorado or its school districts have "aimed low." *See* COLO. REV. STAT. § 22-7-1005 (requiring the Colorado Board of Education to "[e]nsure that [Colorado's] standards are comparable in scope, relevance, and rigor to the highest national and international standards that have been implemented successfully"). Likewise, the States supporting Petitioner as *amici* can set whatever standard they choose so long as it exceeds the floor set by federal law.

Throughout the evolution of standards-based education reform, Congress has expressed its conviction that state and local autonomy is an essential component of raising the bar for all student subgroups. The IASA, for example, declares that "[d]ecentralized decisionmaking is a key ingredient of systemic reform. Schools need the resources, flexibility, and authority to design and implement effective strategies for bringing their children to high levels of performance." Pub. L. No. 103-382 § 1001(c)(8).

This Court emphasized the same principle with regard to NCLB in *Horne v. Flores*:

> NCLB marked a dramatic shift in federal education policy. It reflects Congress' judgment that the best way to raise the level of education nationwide is by granting state and local

> officials flexibility to develop and implement educational programs that address local needs, while holding them accountable for the results. NCLB implements this approach by requiring States receiving federal funds to define performance standards and to make regular assessments of progress toward the attainment of those standards.

557 U.S. at 461. And expanded local autonomy is the calling card of amendments reflected in 2015's Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, § 1111, 129 Stat. 1802 (2015).[11]

The conditions expressed by Congress in its various enactments emphasize IDEA's core purpose as an educational access statute, setting a floor of opportunity for a population with a history of exclusion from public education. Congressional expressions of intent regarding the use of federal funds—under IDEA, NCLB, and ESSA—reaffirm a commitment to state and local flexibility. The States should be trusted to fulfill the role that Congress has given them.

And Colorado has proven worthy of that trust. Colorado's commitment to high expectations for all students is not dependent on the legal standard for

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[11] *See* Kimberly Jenkins Robinson, *No Quick Fix for Equity and Excellence: The Virtues of Incremental Shifts in Education Federalism*, 27 STAN. L. & POL'Y REV. 201, 242 (2016) ("ESSA represents a backlash against the substantial expansion of the federal role in education."); *see also* Jessica Bulman-Pozen, *Executive Federalism Comes To America*, 102 VA. L. REV. 953, 990 (June 2016) (stating that the ESSA "curbs federal executive supervision of state education policy going forward").

reviewing IEPs; rather, it is based on sound accountability systems designed to raise the bar for all student subgroups. To implement the goals of the ESEA and NCLB, SEAs like the Colorado Department of Education implement an accountability system that "grades" school districts and individual schools based on multiple metrics. The primary metric is academic achievement (both for all students and for each subgroup), as measured by proficiency on the annual assessment. Accountability systems also evaluate indicators such as high school graduation rates and the percentage of English language learners making progress in English proficiency. 20 U.S.C. § 6311(c)(4).[12] The State accountability system enables meaningful differentiation between schools "for all students and subgroups of students" and enables identification of any school "in which any subgroup of students is consistently underperforming." *Id.* § (c)(4)(C)(iii). It is through this accountability monitoring—not through individual student litigation—that States like Colorado ensure that schools and districts are raising the floor of educational opportunity for all subgroups, including students with disabilities. If students with disabilities are failing to achieve academically, this accountability process is designed to identify it.

If a State fails to comply with the ESEA's accountability requirements, the U.S. Department of Education has a range of enforcement options available to it. These include issuing a cease and desist order, 20

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[12] Amendments under the ESSA revised state accountability requirements in a number of respects, but left untouched the core mandates of high standards, regular assessments, and state-monitored accountability.

U.S.C. § 1234e, entering into a compliance agreement with the SEA, *id.* § 1234f, and suspending or withholding all or a portion of the State's Title I, Part A programmatic funds, *id.* § 1234d. The States have similar enforcement authority, including the ability to withhold a district's Title I, Part A funds. *See, e.g., id.* § 1232c.

Specific to disabled students, the Department analyzes data disaggregated in a variety of ways, including by disability, by site, and even by grade, so that it can identify schools or districts in need of technical assistance. The Department provides guidance to schools in aligning IEPs with state academic content standards.[13] It is through this process that the State ensures that schools assist students with disabilities—and other student subgroups—to reach the high standards adopted under NCLB. Rather than promoting this goal, individual student litigation such as that proposed by Petitioner diverts scarce resources and places critical education policy decisions in the hands of judges instead of educators.

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[13] *See, e.g.*, Colo. Dep't of Educ., *Writing Standards-aligned Advanced Learning Plans (ALPs) and Individualized Education Programs (IEPs): A Supplemental Guidance Document for Designing Effective Formal Educational Plans* (Sept. 2014; Updated March 2016), http://tinyurl.com/hrdjxk7.

II. Petitioner and the Federal Government propose a standard that will impede collaboration between schools and families and that is fundamentally unworkable.

As other *amici* have noted, setting high expectations for students with disabilities has been determined to be in the best interests of students and communities, and is standard practice in 21st century education. *See* Nat'l Ass'n of State Dirs. Of Special Educ. *Amicus* Br. 6–7. But the question in this case is whether a specific *additional* obligation should be judicially grafted onto the IDEA; specifically, one that invites reviewing judges to second-guess educators using ambiguous terms. Because the proposed standard would interfere with collaboration between schools and families, and is unworkable, the Court should decline to add such a threshold.

A. The proposed standard of review threatens the school and family collaboration that is the hallmark of IEP development.

The IEP development process is designed to be a collaborative effort between schools and families. In *Schaffer v. Weast*, this Court cited the "cooperative process that [IDEA] establishes between parents and schools" as the "core of the statute." 546 U.S. at 53. Parents play a "significant role" in the process and function as formal members of the IEP team. *Id.* (citing 20 U.S.C. § 1414(d)(1)(B)). The cooperative process ends when parents pursue judicial intervention, and a precipitous trip to the courthouse "run[s] counter to Congress' view that the needs of handicapped children are best accommodated by having the parents and the local educational agency work together to formulate an

individualized plan for each handicapped child's education." *Smith v. Robinson*, 468 U.S. 992, 1012 (1984).

The legal framework for resolving special education disputes repeatedly emphasizes communication and consensus over litigation. SEAs like the Department must offer mediation services and have a complaints process. 20 U.S.C. § 1415(b)(5)–(6). The 2004 amendments to IDEA require districts to respond to parent complaints by providing a written description of the reasoning, options considered, and factors used in reaching an IEP decision. *Id.* § 1415(c)(2)(B)(i)(I). If a dispute thereafter develops, Congress has directed that any due process complaint notice must contain "a description of the nature of the problem" and "a proposed resolution of the problem to the extent known and available." *Id.* § 1415(b)(7)(A)(ii)(IV). Colorado's due process rules require that within fifteen days of receiving a parent's due process complaint, the Administrative Unit must convene a resolution meeting between parents and appropriate members of the IEP team. *See* Colo. Dep't of Educ., *State Level Complaint Procedures* at 2, http://tinyurl.com/hp4ze9g. "The purpose of the resolution meeting is for the parent of the child to discuss" the complaint so that the Administrative Unit can try to resolve it. 1 CODE COLO. REGS. § 301-8(7.5)(d)(1)(B).

Adjusting the standard as Petitioner and the Federal Government propose is unlikely to assist students but will most certainly increase litigation and discourage the family-school cooperation that is at the heart of the IDEA. A nebulous, aspirational articulation of a legal standard—especially one not

rooted in the language of the statute—invites families to believe that there are somehow greater remedial prospects at the courthouse than within the education system, and thereby discourages cooperation and collaboration.

B. The proposed standard is unworkable.

Colorado has nearly 900,000 public school students, approximately ten percent of whom are receiving special education services.[14] The suggestion that courts should judge the sufficiency of those students' IEPs based on nebulous modifiers and on an after-the-fact review of educational outcomes, rather than adherence to IDEA's statutory requirements, risks an increase in litigation and a breakdown in the collaborative process that is the hallmark of IDEA. Likewise, the legal standard suggested by the Petitioner would impair the ability of SEAs like the Department to resolve disputes at the mediation, state complaint, or due process hearing level.

1. The proposed standard is ambiguous.

The notion that an "appropriate" education for students with disabilities is one that provides "substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society," Pet. Br. 40, is laudable in purpose, yet unworkable as a legal standard. It would invite courts to "impos[e] their view of preferable educational

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[14] *See* Colo. Dep't. of Educ., *Colorado Education Facts and Figures* (Oct. 2016), http://tinyurl.com/hv3ag3n; Colo. Dep't. of Educ., *Students with Disabilities Birth-21* (2015), http://tinyurl.com/zpl8les.

methods" upon the States, in direct contravention of the principles articulated in *Rowley*. 458 U.S. at 207. Any proposed "heightened standard" for IEP development, without specific grounding in IDEA's tangible expectations, risks confusing those educators who work to develop IEPs every day. Worse still, it invites an explosion in special education litigation as lawyers and judges wrestle to define the boundaries of a judicially crafted statutory change.

Colorado has responsibilities to all students, including a variety of populations that have struggled to achieve. In fact, IDEA is not the only statute in which the State is tasked with providing a FAPE to an at-risk student subgroup. In the Stewart B. McKinney Homeless Assistance Act, Congress mandated that a FAPE be provided to homeless children:

> Each state educational agency shall ensure that each child of a homeless individual and each homeless youth has access to the same *free, appropriate public education*, including a public preschool education, as provided to other children and youths.

Pub. L. No. 100-77, § 721, 81 Stat. 783 (1987) (codified as amended at 42 U.S.C. § 11431) (emphasis added).

Unlike IDEA, the McKinney-Vento Act[15] does not provide a checklist definition of the term "free, appropriate public education." It also does not contain

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[15] The Act's name changed with a 2000 reauthorization. *See* McKinney-Vento Homeless Assistance Act, Pub. L. No. 106-400, 114 Stat. 1675 (2000).

an IEP process and related procedural safeguards, so that courts have not been called upon to interpret the term. In Colorado, the Board and the Department are responsible for creating State Plans that incorporate compliance with both IDEA and McKinney-Vento. Although the statutes are vastly different, the State of Colorado cannot administer them in such a way that suggests that the assurance of a FAPE for students with disabilities confers something greater than does a FAPE guarantee for a homeless student. In fact, if the Court changes the FAPE standard under IDEA, it risks upending the balance that Colorado has struck trying to meet the needs of all students.

Petitioner suggests that student expectations are exclusively defined by the legal standard for judicial review. Absent correction, he asserts, the IEPs of students with disabilities who live in the Tenth Circuit will be out of sync with ESEA's high expectations for all student groups. *See, e.g.*, Pet. Br. 29 ("The Tenth Circuit's adherence to the just-above-trivial standard runs headlong into the IDEA's and ESEA's demands for academic accountability and achievement."). Not so. Unlike the *Rowley* standard, which is based on the IDEA's text, neither Petitioner's nor the Federal Government's proposed standard derives from the statute—they would instead be entirely judicial creations. *See* Resp. Br. 49–51. Rather than a standard applied when teachers, specialists, and families join together to develop an IEP, Petitioner seeks to import from the outset the standard of review that a judge applies when the cooperative process of IEP development has already failed, when well-intentioned

families and caring educators have intractably locked horns. This Court should reject that invitation.

The revised standards of review proposed by the Petitioner and the Federal Government insert a level of ambiguity and subjectivity into the review of an IEP that will create uncertainty and invite litigation. Through its dispute resolution program, the Department can evaluate an IEP to see, for example, if it articulates challenging yet attainable goals and reflects a research-based pedagogy and individual services reasonably calculated to allow a student to "advance appropriately towards attaining [those goals]." *See* 20 U.S.C. § 1414(d)(1)(A)(i). It is far less likely that the Department can mediate a dispute as to whether an IEP "aims" to provide "substantially equal" opportunities," Pet. Br. 40 or "provides the child an opportunity to make significant progress in light of his capabilities," U.S. Amicus Br. 17.

Effective administration of the IDEA requires that the Department operate under an objective standard. Petitioner's proffered change in the baseline set by *Rowley* raises the substantial risk that an IEP that is fully compliant with IDEA's content requirements and "reasonably calculated" at its inception would nonetheless be labeled infirm upon judicial review—based on a subjective standard disconnected from the statute's plain language. An ambiguous review standard thus reinforces the notion that there may be something to be gained under a subjective standard applied at the courthouse that is not available from educators.

2. The legal sufficiency of an IEP should not be judged in hindsight based on outcomes.

Petitioner and the Federal Government invite judges to Monday-morning quarterback[16] the quality of an IEP based on the student's academic outcome, rather than on whether there was faithful adherence to a process that this Court recognized will "in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley*, 458 U.S. at 206. Yet whether an IEP is "reasonably calculated" to provide educational benefit is an assessment that must be made at the time the IEP is created, based on the information available to the district at that time. Year-end achievement data for a particular student no more determines the adequacy of that year's IEP than does a surgical outcome determine whether an operating physician met the standard of care. And educational growth is a product of myriad factors, only some of which can be controlled or adjusted through an IEP.

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[16] Although Petitioner claims to recognize that the obligation to provide a FAPE is "not guaranteed to produce any particular outcome," Pet. Br. 49, it is *precisely* because the student in this case did not progress much that the sufficiency of his IEP is under attack. *Id.* at 34. Petitioner's *amici* States likewise misstate the standard, asserting that an IEP is judged by what it "confers," not by what it is "reasonably calculated" to confer. *See also* Del., Mass., & N.M. Amicus Br. 3–4 (complaining that if the *Rowley* standard "requires only more than *de minimis* ***progress*** ... then as a nation we have not [addressed Congress' purpose in adopting IDEA]") (emphasis added).

This Court's review of the Equal Education Opportunities Act requirement that a State take "appropriate action" to overcome language barriers is instructive. In *Horne v. Flores*, this Court held that "subpar performance" was not enough to suggest that the State of Arizona had failed to take "appropriate action." 557 U.S. at 468 (holding that appropriate action "does not require the equalization of results between native and non-native speakers on tests administered only in English"). Likewise here, an after-the-fact review of educational outcome cannot dictate sufficiency of the IEP process.

For over 30 years, Congress has defined the education system's obligations to students with disabilities in terms of carefully crafted procedural and substantive requirements. Those provisions ensure that each student with disabilities is considered individually to ensure that the right goals are set and services arranged to allow that student to have the same chance to succeed as his peers. But even the best educational judgments can miss the mark, so the IDEA likewise requires that the school revisit the IEP at least annually. 20 U.S.C. § 1414(d)(4)(A). This cycle—plan, implement, assess, and revise—happens at a macro level through the ESEA State Plan and at a micro level in millions of IEP meetings all over the country. It is an iterative, collaborative process between schools and families.

The IEP team must review the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved. The team must consider:

- Any lack of expected progress toward the annual goals and in the general education curriculum, if appropriate;
- The results of any reevaluation;
- Information about the child provided to, or by, the parents; and
- The child's anticipated needs.

Id. That an IEP produces sub-optimal progress does not suggest that IDEA was violated,[17] but simply means that the annual review process will have to do its work.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

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[17] Although this Court has not been called upon to directly address the question, the Circuit Courts uniformly recognize that the appropriateness of an IEP is judged prospectively, not retrospectively. *See, e.g., Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990) ("An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated."); *K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 808 (8th Cir. 2010) (same); *see also Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) ("[W]e examine the adequacy of [the IEPs] at the time the plans were drafted."); *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 530 (3d Cir. 1995) (holding that an IEP must be judged prospectively from the time of its drafting); *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 185–86 (2d Cir. 2012) (same). This "at the time of drafting" approach is also consistent with this Court's expectation that an IEP be *reasonably calculated*.

Respectfully submitted,

CYNTHIA H. COFFMAN
Attorney General

FREDERICK R. YARGER
Solicitor General
Counsel of Record

GLENN E. ROPER
Deputy Solicitor General

JULIE C. TOLLESON
First Assistant Attorney General

Office of the Colorado Attorney General
1300 Broadway
10th Floor
Denver, Colorado 80203
Fred.Yarger@coag.gov
(720) 508-6186

Counsel for Amici Curiae Colorado State Board of Education and Colorado Department of Education

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Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, CHILDREN AND ADULTS WITH ATTENTION-DEFICIT/HYPERACTIVITY DISORDER, AND THE CALIFORNIA ASSOCIATION FOR PARENT-CHILD ADVOCACY IN SUPPORT OF PETITIONER

Caroline J. Heller
Counsel of Record
GREENBERG TRAURIG, LLP
The MetLife Building
200 Park Avenue
New York, New York 10166
212-801-9200
hellerc@gtlaw.com

Selene Almazan-Altobelli
Alexis Casillas
Judith A. Gran
Catherine Merino Reisman
Ellen Saideman
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
Counsel for Amici Curiae
P.O. Box 6767
Towson, Maryland 21285
844-426-7224

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Council of Parent Attorneys and Advocates ("COPAA") is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates.[1] COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties. COPAA does not represent children but provides resources, training, and information for parents, advocates, and attorneys to assist them in obtaining the free appropriate public education such children are entitled to under the Individuals with Disabilities Education Act ("IDEA" or "Act"), 20 U.S.C. § 1400 *et seq.* COPPA's attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates, in seeking to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) ("Section 1983"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504") and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA").

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[1] Both parties have given written consent to the filing of all amicus briefs. No counsel for a party authored this brief in whole or in part, and no person other than amicus, its members, or their counsel made a monetary contribution to the preparation or submission of this brief.

COPAA brings to the Court the unique perspective of parents, advocates, and attorneys for children with disabilities. Many children with disabilities experience significant challenges. Whether these children eventually gain employment, live independently, and become productive citizens depends in large measure on whether they secure their right to the free appropriate public education guaranteed under the IDEA and other educational policies. Indeed, the soul of the IDEA is its codified goal that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living . . . ." 20 U.S.C. § 1400(d)(1)(A).

Through its work with parent, advocate, and attorney members across the United States, COPAA understands the real world importance of an universally applicable, clearly defined legal standard, consistent with the intent and purpose of the IDEA, concerning the educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the IDEA, the question before the Court in this case.

Children and Adults with Attention-Deficit/ Hyperactivity Disorder ("CHADD"), a 501(c)(3) not-for-profit organization, is the largest national organization representing children and adults with attention-deficit/hyperactivity disorder. Founded

in 1987, CHADD currently has approximately 10,000 individual members and 2,000 professional members. CHADD works to ensure that the rights of students with disabilities under the IDEA, Section 504 and the ADA are protected through legislative advocacy, training and public awareness. CHADD is dedicated to ensuring that students covered by the IDEA receive a free appropriate public education that "emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living . . . ." 20 U.S.C. § 1400(d)(1)(A).

The California Association for Parent-Child Advocacy ("CAPCA") is a volunteer-based organization engaging in legislative and policy advocacy on matters of concern to students with disabilities in California. Members of CAPCA participate as professionals and/or as family members of students with disabilities, in Individualized Education Program meetings, resolution sessions, mediations, due process hearings and appeals throughout California. CAPCA was founded in 2003 when parents and advocates came together to resist proposals in the California legislature to drastically shorten the statute of limitations in special education cases and to impose other restrictions on the exercise of parental and student rights.

SUMMARY OF THE ARGUMENT

This Court has been asked to decide: "What is the level of educational benefit that school districts must confer on children with disabilities to provide them with a free and appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*" The Respondent proposes that this Court adopt the lax and vague standard that school districts need only confer "more than *de minimis* educational benefit" in order to meet the IDEA's requirements, Supplemental Brief in Opposition to Petition for Writ of Certiorari for Respondent at 1, *Endrew F. v. Douglas County School District Re-1*, No. 15-827 (Sept. 6, 2016), but this standard is contrary to the plain language of the IDEA, its legislative history, and this Court's decision in *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176 (1982). More importantly it stands at odds with the achievement driven educational policies that have replaced the access approach to educational policy that this Court perceived in *Rowley*.

In 1975, gross disparities in access to educational programming and school campuses for students with disabilities prompted Congress to enact the Education for All Handicapped Children Act ("EHA"), Pub. L. No. 94-142, 89 Stat. 773, to guarantee that children with disabilities obtain a "free appropriate public education." Just seven years later, in 1982, this Court considered, *inter alia*: "What is meant by the Act's requirement of a 'free

appropriate public education'?" *Rowley*, 458 U.S. at 186. Against the historical backdrop of an educational policy that focused on children with disabilities obtaining access to public school campuses and receiving any education, whatsoever, this Court "conclude[d] that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Id.* at 201.

However, since this Court issued its decision in *Rowley*, educational policy has steadily shifted away from framing educational benefits for children with disabilities (and others) in terms of access to education and focusing, instead, on standardized academic achievement to progress. Thus, any effort to quantify the amount of educational benefits required by the Act, in light of *Rowley*'s "basic floor of opportunity" approach is analogous to forcing an access-driven peg into, what is now, an achievement-based hole. The result of which is that courts have attempted to craft convoluted and often meaningless standards to determine whether a school district has conferred an educational benefit upon a child with disabilities. This effort has caused entirely inconsistent outcomes across the United States.

Because of the significant intervening legal, policy, and educational developments since *Rowley*, *Amici* propose the following standard: A child "benefits from" instruction when the services target all areas of educational need in order to ensure achieve-

ment consistent with non-disabled peers in the general education curriculum so as to enable students to be prepared for post-school activities.

Once a parent challenging his or her child's individualized education program has demonstrated the child has failed to progress commensurately with nondisabled peers in the general education curriculum, the court's inquiry then shifts to determining whether the school district's most recent assessments and evaluations, initial individualized education program planning, and recalculation in light of lack of expected progress has all occurred pursuant to the requirements laid out in 20 United States Code Section 1414, as discussed below. Because Congress intended this country's education policy to further the ultimate goals of learning and close achievement gaps between all students in that high-expectations general education curriculum, departures from either the rate of learning on a particular campus, from the overall content expected to be mastered, or the focus in the general education at all must be justified by the assessments, data, and planning Congress established for understanding how educational decisions were to be made for each individual student.

ARGUMENT

I. *Rowley* Instructs Federal Courts to Consider and Adhere to Federal Education Policy in Construing IDEA's Obligations

This Court decided *Rowley* only seven years after Congress determined that students had a right to be educated in public school settings regardless of their disability status, Pub. L. No. 94-142, 89 Stat. 773 (1975), and only five years after the clarifying regulations were finalized in 1977, Education of Handicapped Children: Implementation of Part B of the Education of the Handicapped Act, 42 Fed. Reg. 42474 (1977). The *Rowley* decision also came on the heels of the racial desegregation efforts across the country, *see e.g.*, *Morgan v. Hennigan*, 379 F. Supp. 410, 482–83 (D. Mass. 1974) (ordering desegregation of the Boston Public School Systems) *supplemented in Morgan v. Kerrigani*, 388 F. Supp. 581 (D. Mass. 1975); *see also Milliken v. Bradley*, 418 U.S. 717 (1974) (addressing desegregation plans in Detroit). Given this backdrop and the focus on access to schools for all children across the country, it is unsurprising that this Court concluded in *Rowley* that "[w]e would be less than faithful to our obligation to construe what Congress has written if in this case we were to disregard the statutory language and legislative history of the Act by concluding that Congress had imposed upon the States a burden of unspecified proportions and weight, to be revealed only through case-by-case adjudication in the courts." 458 U.S. at 190, n.11.

Rowley emphasized that courts must look to federal policy, as well as the explicit definition in the IDEA, to ascertain the substantive rights conferred by the Act. Specifically, this Court stated, "[w]e are loath to conclude that Congress failed to offer any assistance in defining the meaning of the principal substantive phrase used in the Act. It is beyond dispute that, contrary to the conclusions of the courts below, the Act does expressly define 'free appropriate public education' . . . ." *Id.* at 187.

Rowley goes on to state: "Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act." *Id.* at 189. The "other items from the definitional checklist" require that instruction and services: (i) "be provided at public expense and under public supervision"; (ii) "meet the State's educational standards"; (iii) "approximate the grade levels used in State's regular education"; and (iv) "comport with the child's IEP." *Id.*

Following *Rowley,* federal courts have employed a variety of adjectives—"some," "minimal," "meaningful,"—and the phrase "more than *de minimis*," in attempts to quantify how much educational benefit an individualized education program ("IEP") need confer upon a child to provide a free appropriate public education ("FAPE") under the IDEA. *See O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015) (noting that the Fourth Circuit's

"standard remains the same as it has been for decades: a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial . . . "); *M.B. ex rel. Berns v. Hamilton Se. Sch.*, 668 F.3d 851, 862 (7th Cir. 2011) (agreeing that a student who makes just more than trivial progress has received a FAPE); *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1120 (2d Cir. 1997) (describing that a state IEP must be reasonably calculated to provide some "meaningful" benefit (citing *Rowley*, 458 U.S. at 192)); *JSK by and through JK v. Hendry Cty. Sch. Bd.*, 941 F.2d 1563, 1572–73 (11th Cir. 1991) ("[w]hile a trifle might not represent adequate benefits," some benefit is all that is required) (internal quotation marks omitted).

However, these adjectives generate the misconception that the IDEA requires a set, quantifiable amount of educational benefits for all children with disabilities when, in fact, the educational benefit required by the IDEA will vary from child to child because the IDEA also requires that programs and services must be "individually tailored" and "reasonably calculated" in light of the specific student's unique needs. As discussed more fully in the next section, the standards articulated by federal courts, in attempting to quantify the amount of educational benefit an IEP must provide, fail to take into account changes in the law, as well as changes in federal educational policy. Accordingly, pursuant to the IDEA, to the extent that the students are not making progress in the general edu-

cation curriculum commensurate with their non-disabled peers, educational benefit inquiry must be addressed in light of the students' unique needs as reflected in recent evaluations and data available to the IEP teams.

II. The Legal and Educational Policy Landscape Has Changed Since *Rowley*

The history of education in the United States has come a long way since *Rowley*, and the context of educational entitlements during the 1970s through the 1980s were very different from what they are today. The 1975 statute had ended the exclusion of large numbers of children with disabilities from public school, but since the early 1980s, Congress has determined that mere access to education is not enough. Public education policy agenda and statute after statute has established a substantive and achievement-driven basic floor of educational opportunity which ***all*** students, not just students with disabilities, must reach.

Shortly after this Court decided *Rowley*, educational policy changed from addressing integration and access to addressing educational results. In 1984, the Carl D. Perkins Vocational and Technical Education Act, Pub. L. No. 98-524, 98 Stat. 2437 (current version at 20 U.S.C. § 2301 *et seq.* (2006)), was passed with the goal of increasing vocational-technical education in the United States. In line with the shifting focus to outcomes, in 1990, eight years after *Rowley*, Congress reauthorized the IDEA—the successor to Pub. L. No. 94-142—and

added requirements that transition services be included in IEPs so as to prepare students for post-secondary life. *See* Pub. L. No. 101–476, 104 Stat. 1103, 1103–04 (1990) (amending 20 U.S.C. § 1401(a)(19) to read "[t]he term 'transition services' means a coordinated set of activities for a student, designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment) . . . ").

The shift from an access-driven to a results-oriented educational agenda continued in the 1990s through the 2000s. In 1993, Massachusetts enacted the Massachusetts Education Reform Act, which created standardized tests as a measure of student achievement and progress towards general education curriculum measures. Mass. Gen. Laws ch. 69, §§ 1D-1G (1993). In 1994, President Clinton signed into law a reauthorization of the Elementary and Secondary Education Act of 1965, now referred to as the Improving America's Schools Act ("IASA"), with provisions for increased funding for education of students with higher needs (bilingual and immigrant education), and a focus on preparing students to "meet high academic standards in order to succeed." Richard W. Riley, *The Improving America's Schools Act of 1994, Reauthorization of Elementary and Secondary Education Act*, U.S. Dep't of Educ., at 4 (Sept. 1995), https://www2.ed.gov/offices/OESE/archives/legislation/ESEA/brochure/iasa-bro.html.

In 2001, Congress and President George W. Bush built on the IASA's focus on a core of challenging state standards and expanded on Massachusetts's efforts, resulting in the No Child Left Behind Act ("NCLB") being signed into law on January 8, 2002. *See* Pub. L. No. 107-110, 115 Stat. 1425 (2002) (current version at 20 U.S.C. § 6301 *et seq.* (2015)). The NCLB had the overarching purpose of ensuring "that all children [receive] a fair, equal, and significant opportunity to obtain a high-quality education" and to close educational achievement gaps. Pub. L. No. 107-110, 115 Stat. 1425, 1439–40 (2002). Academic accountability was the cornerstone of NCLB, which asked schools to develop educational programming so as to ensure that each student reached at a minimum, proficiency, on challenging State academic achievement standards and state academic assessments. *Id.* Moreover, NCLB specifically called for our educational system to:

> (1) ensur[e] that high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards so that students, teachers, parents, and administrators can measure progress against common expectations for student academic achievement;
>
> (2) meet[] the educational needs of low-achieving children in our Nation's highest-poverty schools, limited English proficient children, migratory children, ***children***

> ***with disabilities,*** Indian children, neglected or delinquent children, and young children in need of reading assistance; . . .
>
> (4) hold[ ] schools, local educational agencies, and States accountable for improving the academic achievement of all students, and identifying and turning around low-performing schools that have failed to provide a high-quality education to their students, while providing alternatives to students in such schools to enable the students to receive a high-quality education.

Id. (emphasis added).

In 2004, after aligning the basic floor of educational expectations with the "high-quality education" standards in NCLB, Congress reauthorized the IDEA again, strengthening the systems for developing student programs and evaluating progress. Pub. L. No. 108-446, 118 Stat. 2647 (2004) (current version at 20 U.S.C. § 1400 *et seq.* (2015)).

Borrowing on the ideas and maxims in NCLB, Congress wrote that:

> Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—(A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to—(i) meet developmen-

> tal goals and, ***to the maximum extent possible, the challenging expectations that have been established for all children***; and (ii) be prepared to lead productive and independent adult lives, to the maximum extent possible . . .

Pub. L. No. 108-446, 118 Stat. 2647, 2649 (2004) (current version at 20 U.S.C. § 1400(c)(5)(A) (2015)) (emphasis added).

The Senate Report accompanying the 2004 reauthorization of the IDEA also provided that "[f]or most students with disabilities, many of their IEP goals would likely conform to State and district wide academic content standards and progress indicators consistent with standards based reform within education and the new requirements of NCLB." S. Rep. No. 108-185, at 29 (2003); *see also* Pub. L. No. 108-446, 118 Stat. 2647, 2708 (current version at 20 U.S.C. § 1414(d)(1)(A)(IV) (2015)) (explaining that to achieve the IDEA's goals, the statute requires that an IEP provide such special education, related services, and supports necessary to: "advance appropriately toward attaining the annual goals . . . [and] ***to be involved in and make progress in the general education curriculum*** . . . .") (emphasis added).

The Analysis of Comments and Changes accompanying the 2006 IDEA Part B regulations also explained that "§ 300.320(a)(1)(i) clarifies that the general education curriculum means the same curriculum as all other children. Therefore, an IEP

that focuses on ensuring that the child is involved in the general education curriculum will necessarily be aligned with the State's content standards." *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, Final Rule, 71 Fed. Reg. 46540, 46662 (Aug. 14, 2006).[2] Indeed, researchers have documented the success of an approach that provides access to general education standards for students with disabilities. *See* Ginevra Courtade, et al., *Seven Reasons to Promote Standards-Based Instruction for Students with Severe Disabilities: A Reply to Ayres, Lowrey, Douglas, & Sievers (2011)*,

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[2] *See also* U.S. Dep't of Educ., Office of Special Educ. and Rehab. Servs., *OSERS Dear Colleague Letter on Free and Appropriate Public Education (FAPE)*, at 1 (Nov. 16, 2015), http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf ("To help make certain that children with disabilities are held to high expectations and have ***meaningful*** access to a State's academic content standards . . . [and] to clarify that an [IEP] for an eligible child with a disability under the [IDEA] must be aligned with the State's academic content standards for the grade in which the child is enrolled.") (emphasis added); *Improving the Academic Achievement of the Disadvantaged; Assistance to States for the Education of Children With Disabilities*, Final Rule, 80 Fed. Reg. 50773, 50773–74 (Aug. 21, 2015) (describing how States are "no longer authorize[d] . . . to define modified academic achievement standards . . . for eligible students with disabilities" because "[s]ince these regulations went into effect, additional research has demonstrated that students with disabilities who struggle in reading and mathematics can successfully learn grade-level content and make significant academic progress when appropriate instruction, services, and supports are provided.") *Id.* (footnote omitted).

47(1) Educ. & Training in Autism & Developmental Disabilities 3, 3–5 (2012).[3]

The most recent iterations of the IDEA continued Congress's policy of shifting from an access-driven to an achievement-based educational agenda, and were ***absolutely intended*** to align with the shifting educational agenda, set forth in NCLB, of "high-quality education" based on "academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials . . . aligned with challenging State academic standards." Pub. L. No. 107-110, 115 Stat. 1425, 1439 (current version at 20 U.S.C. § 6301(1) (2015)).

In fact, the most recent iteration of our education policy, the Every Student Succeeds Act ("ESSA"), specifically contemplates coordination with the IDEA, 20 U.S.C. § 6311(a)(1)(B) (2015), and expects students with disabilities would meet the same standards as their non-disabled peers except for in cases of "students with the most significant cogni-

[3] "Through [the IDEA] policies, the expectation for students with significant cognitive disabilities has evolved from simply participating in assessment; to the documented achievement of adequate yearly progress in reading, math, and science; to the expectation that these assessments document achievement with clear links to state grade-level content standards, even when applying alternate achievement standards for this population." Diane M. Browder, et al., *Creating Access to the General Curriculum with Links to Grade-Level Content for Students with Significant Cognitive Disabilities: An Explication of the Concept*, 41 J. Special Educ. 2, 2 (2007).

tive disabilities." 20 U.S.C. § 6311(b)(2)(D) (intending to ensure that no more than 1% of the total number of students in a State may be assessed using alternate assessments in any subject). Indeed, the New York Times recently noted that early intervention and education in the mainstream, which includes a focus on academic achievement, required by IDEA, has contributed to the growing numbers of students with autism entering college, with opportunities that "could not have been imagined had they been born even a decade earlier." Jan Hoffman, *Helping Autistic Students Navigate Life on Campus*, N.Y. Times, Nov. 20, 2016, at A1.

III. IDEA Imposes Specific Obligations on School Districts and the School District Failed to Comply with These Obligations in this Case

A. IDEA Contains Substantive Requirements for Appropriate Programming

This Court's decision in *Rowley* requires "personalized instruction" with "sufficient supportive services." 458 U.S. at 189. The only way to determine whether the IEP meets these requirements is to analyze whether a school district has complied with ***all*** of the substantive obligations created by the IDEA.

1. School Districts Must Evaluate Children in All Areas of Suspected Disability and Use the Evaluation as the Foundation for Developing a Program and Goals

The IDEA provides that all students, suspected of having a disability as well as those already determined to be IDEA-eligible, have to be evaluated upon suspicion of disability, and subsequently no less than once every three years. 20 U.S.C. § 1414(a) (2015). These evaluations must assess the child in "all areas of suspected disability." *Id.* § 1414(b)(3)(B). Evaluations must provide "relevant information that directly assists persons in determining the educational needs of the child . . . ." *Id.* § 1414 (b)(3)(C). Indeed, the Act and its implementing regulations require school districts, in developing a child's IEP, to consider the most recent evaluative data of the child, *see id.* § 1414(c)(1)(A); 34 C.F.R. § 300.324(a)(1)(iii) (2016), and evaluations are considered a foundation for the IEP. *See* 20 U.S.C. § 1414 (b), (d).

The Second Circuit recently held that:

> The purpose of the requirement is to ensure that a [school district], in formulating a student's IEP, provides the student with services narrowly tailored to his or her particular educational needs based on actual and recent evaluative data from the student's education providers, so that the developed IEP will reasonably enable the

> child to receive the educational benefits to which he or she is entitled by law.

L.O. v. N.Y.C. Dep't of Educ., 822 F.3d 95, 111 (2d Cir. 2016).

2. School Districts Must Develop Measurable Goals to Address the Student's Disability-Related Needs that Ensure Progress in the General Education Curriculum

School Districts must develop measurable goals designed to address disability-related needs so as to enable the student to be involved in and ***make progress in*** the general education curriculum. 20 U.S.C. § 1414(d)(1)(A)(i)(II) (emphasis added). For many children, that means creating high, yet achievable, goals in line with grade-level general education curriculum so as to meet the State academic content standards, 20 U.S.C. § 1401(9), even if that requires presenting grade-level content in a modified way. *See OSERS Dear Colleague Letter on Free and Appropriate Public Education (FAPE)*, *supra* note 2, at 6–7.

The IEP team may, after careful consideration of all evaluative data, determine that the child needs goals aligned with alternate standards. In such a case, the goals must align with the State's grade-level content standards for students in the general education curriculum.

3. IDEA Explicitly Requires Course Correction if a Child Is Not Making Progress

The clearest indication of how procedural compliance with the requirements of the IDEA does not, alone, demonstrate a student has received educational benefit can be found in the obligation that school districts continually update assessment and data collection, and then update the IEP to ensure that a student's progress and goals adhere as closely as possible to the high-quality general education academic standards. Congress realized, at various points of reauthorization, that the planning and initial offering of a particular educational program and course of study would not always lead to a program that would enable the student to make adequate educational progress. As such, the IDEA requires that the school district make changes in the goals or the services in the IEP to enable the student to make progress. 20 U.S.C. § 1414(c)(1)(B)(i), (d)(4)–(5)(A); 34 C.F.R. § 300.324. Thus, IDEA mandates that the IEP Team a ddress "any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate . . . ." 20 U.S.C. § 1414(d)(4)(ii)(I).[4]

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[4] As part of their obligation to monitor local school districts, several states have adopted a formal Educational Benefit Review ("EBR") protocol that carefully examines whether students have made expected annual progress, and, if not, whether sufficient educational services were provided. *See* Kimberly A. Mearman, *Educational Benefit Review Process: A*

B. The Tenth Circuit Failed to Apply These Standards Appropriately to *Endrew F.*

Had the Tenth Circuit in *Endrew F. v. Douglas County School District Re-1*, measured Endrew's

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Reflective Process to Examine the Quality of IEPs, State Educ. Res. Ctr. of Conn., at 3, http://www.ctserc.org/assets/documents/news/2013/serc-edbenefit.pdf (last visited Nov. 18, 2016); Penn. Dep't of Educ., *Educational Benefit Review (EBR)*, 2 Special Education Leader 1, 2-3 (August 1, 2014), http://pattan.net-website.s3.amazonaws.com/images/2014/09/26/LDR_2_1_EBR0814.pdf; California Dep't of Educ., Special Educ. Div., *Special Education Self-Review: Instructions and Forms Manual*, at 21-24 (revised October 14, 2013), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwilrK3ClbbQAhUrj1QKHfTDCagQFgggMAA&url=ftp%3A%2F%2Fftp.cde.ca.gov%2Fsp%2Fse%2Fds%2F2013-14%2520SESR%2F2013-14%2520SESR%2520Instruction%2520Manual.doc&usg=AFQjCNEQ9QmUiayeedclTWITerb-WdGmhmA. Indeed, EBR protocols are designed to determine whether students' IEPs offered educational benefits by evaluating whether the IEPs complied with the explicit substantive requirements of IDEA cited herein. This EBR protocol thus recognizes the relationship between good educational programs and expected student progress; students are more likely to make good progress in good educational programs than in bad ones. Focusing on whether the student made any progress at all on any goal, as the Tenth Circuit did here, ignores the school district's responsibility to assist students with disabilities in making appropriate annual yearly progress on all educational goals, and instead results in lowering expectations and providing lesser services for students who do not make adequate progress, rather than improving their educational programs so that the students can make good progress.

("Drew") educational program against IDEA's specific requirements, it would have determined that the IEP failed to target all areas of educational need. Additionally, Drew made no progress in a number of educational and functional goals, and his behaviors escalated over a two-year period to the point that his behaviors were a substantial impediment to any educational progress. *See Endrew F.*, 798 F.3d 1329, 1335–37 (10th Cir. 2015). Had the Tenth Circuit evaluated Drew's educational program against IDEA's specific requirements, it would have determined that the school district failed to make any changes to Drew's program reasonably calculated to address these behavioral problems.

When behavior is "a central component" of a child's disability, and the IEP fails to address the "significant behavioral issues," that deficiency alone may render an IEP substantively inadequate. *Bd. of Educ. of Evanston-Skokie Cmnty. Consol. Sch. Dist. 6J v. Risen*, No. 12 C 5073, 2013 U.S. Dist. LEXIS 88575, at *57 (N.D. Ill. June 25, 2013). An IEP's failure to provide a Functional Behavioral Assessment (FBA)[5] and a Behavioral Intervention

[5] Functional Behavioral Assessment (FBA) is a results-oriented approach to behaviors, closely examining the function that the behavior serves for the individual, typically through observation and data collection, developing a hypothesis of the purpose the behavior serves and then working to replace the challenging behavior with more appropriate behaviors or skills. For example, for some individuals who have communication disabilities, challenging behaviors serve

Plan (BIP) to address behaviors impeding learning may itself constitute the denial of a FAPE. *P. v. Wissahickon Sch. Dist.*, No. 05-5196, 2007 U.S. Dist. LEXIS 44945, at *28–29, *34–35 (E.D. Pa. June 20, 2007) (ordering reimbursement of tuition where failure to create a BIP constituted denial of a FAPE), *aff'd in part, rev'd in part on other grounds*, 310 F. App'x 552 (3d Cir. 2009); *see also Danielle G. v. N.Y.C. Dep't of Educ.*, No. 06-CV-2152 (CBA), 2008 WL 3286579, at *10–12, *15 (E.D.N.Y. Aug. 7, 2008) (reversing findings of IHO and SRO and holding that an IEP's failure to include an FBA and BIP, among other deficiencies, deprived the student of a FAPE). This principle is supported by the official commentary to the federal regulations, which expressly states, "a failure to . . . consider and address [behaviors impeding learning] in developing and implementing the child's IEP would constitute a denial of [a] FAPE to the child." 34 C.F.R. Pt. 300, app. A, § IV, at 115.

In short, Drew's program did not comply with the IDEA because the IEP team failed initially to target all areas of educational need in designing the program. The IEP team compounded this error when it failed to recognize, and correct, the deficiencies in Drew's program. Consequently, the

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the function of communication and teaching the student better methods of communication can successfully address the challenging behaviors. *See* V. Mark Durand, *Using Functional Communication Training as an Intervention for the Challenging Behavior of Students with Severe Disabilities* (May 1993), http://eric.ed.gov/?id=ED359697.

school district failed to provide Drew services addressing all areas of his educational need, thus failing to ensure achievement in the general education curriculum consistent with his peers without disabilities. This deprivation amounted to a denial of a free appropriate public education.

CONCLUSION

In the more than 40 years since Congress passed the EHA and the nearly 35 years since this Court decided *Rowley*, in recognition that mere physical "access" to education had been achieved for children with disabilities, numerous amendments to the Act and other educational laws have shifted educational policy away from mere "access" to the schoolroom and towards the goal of standardized academic achievement and progress for all children with disabilities. Consistent with that goal, *Amici* therefore urge the Court to hold that an IEP confers educational benefit when the school district complies with IDEA's substantive obligations in order to target all areas of a student's educational needs to ensure achievement in the general educational curriculum consistent with his or her peers without disabilities. The importance of this universally applicable, clearly defined legal standard, consistent with the intent and purpose of the IDEA and federal educational policy cannot be gainsaid. A free appropriate public education that confers educational benefits consistent with this standard will enable children with disabilities to attend college, graduate school or professional school, obtain

vocational training, obtain employment, and gain self-sufficiency, *i.e.* become productive citizens. *Amici* respectfully request that the Court reverse the judgment of the Tenth Circuit Court of Appeals.

Respectfully submitted,

Caroline J. Heller
Counsel of Record
GREENBERG TRAURIG, LLP
The MetLife Building
200 Park Avenue
New York, New York 10166
212-801-9200
hellerc@gtlaw.com

Selene Almazan-Altobelli
Alexis Casillas
Judith A. Gran
Catherine Merino Reisman
Ellen Saideman
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
Counsel for Amici Curiae
P.O. Box 6767
Towson, Maryland 21285
844-426-7224

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RECORD AND BRIEF

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IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE COUNCIL OF THE GREAT CITY SCHOOLS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

JULIE WRIGHT HALBERT
COUNCIL OF THE GREAT CITY SCHOOLS
1331 Pennsylvania Ave., N.W., Suite 1100N
Washington, DC 20004
(202) 393-2427
jwh@cgcs.org

JOHN W. BORKOWSKI
Counsel of Record
HUSCH BLACKWELL LLP
120 South Riverside Plaza
Suite 2200
Chicago, IL 60606
(312) 655-1500
john.borkowski@huschblackwell.com

DEREK T. TEETER
MICHAEL T. RAUPP
HUSCH BLACKWELL LLP
4801 Main St., Suite 1000
Kansas City, MO 64112
(816) 983-8000

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INTEREST OF *AMICUS CURIAE*[1]

The Council of the Great City Schools ("Council") is a coalition of 70 of the nation's largest urban public school systems, [2] and is the only national

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no persons other than *amicus curiae* or its counsel made a monetary contribution to the brief's preparation or submission.

[2] Albuquerque Public Schools; Anchorage School District; Arlington Independent School District; Atlanta Public Schools; Austin Independent School District; Baltimore City Public Schools; Birmingham City Schools; Boston Public Schools; Bridgeport Public Schools; Broward County Public Schools; Buffalo Public Schools; Charleston County School District; Charlotte-Mecklenburg Schools; Chicago Public Schools; Cincinnati Public Schools; Clark County School District; Cleveland Metropolitan School District; Columbus City Schools; Dallas Independent School District; Dayton Public Schools; Denver Public Schools; Des Moines Public Schools; Detroit Public Schools Community District; District of Columbia Public Schools; Duval County Public Schools; El Paso Independent School District; Fort Worth Independent School District; Fresno Unified School District; Guilford County Schools; Hawaii State Department of Education; Hillsborough County School District; Houston Independent School District; Indianapolis Public Schools; Jackson Public Schools; Jefferson County Public Schools; Kansas City Public Schools; Long Beach Unified School District; Los Angeles Unified School District; Metropolitan Nashville Public Schools; Miami-Dade County Public Schools; Milwaukee Public Schools; Minneapolis Public Schools; New Orleans Public Schools; New York City Department of Education; Newark Public Schools; Norfolk Public Schools; Oakland Unified School District; Oklahoma City Public Schools; Omaha Public Schools; Orange County Public Schools; The School District of Palm Beach County; The School District of Philadelphia; Pinellas County Public Schools; Pittsburgh Public Schools; Portland Public Schools; Providence Public School

organization exclusively representing the needs of urban public schools. Founded in 1956 and incorporated in 1961, the Council serves as the national voice for urban educators and provides a forum to share best practices. The Council is composed of districts with enrollment greater than 35,000 students located in cities with a population exceeding 250,000. Districts located in the largest city of any state are also eligible for membership, based on urban characteristics. The Council's member districts have a combined enrollment of over 7.3 million students.

Headquartered in Washington, D.C., the Council promotes urban education through research, instruction, management, technology, legislation, communications, and other special projects. For the past two decades, the Council's legislative and legal staff has participated extensively in congressional consideration of the Individuals with Disabilities Education Act Amendments of 1997 and the Individuals with Disabilities Education Improvement Act of 2004, as well as development of the attendant regulations promulgated by the Department of Education.

The Council has a strong interest in the outcome of this case, as its member districts implement over

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District; Richmond Public Schools; Rochester City School District; Sacramento City Unified School District; San Antonio Independent School District; San Diego Unified School District; San Francisco Unified School District; Santa Ana Unified School District; Seattle Public Schools; Shelby County Schools (formerly Memphis City Schools); St. Louis Public Schools; St. Paul Public Schools; Toledo Public Schools; Tulsa Public Schools; Wichita Public Schools.

1 million Individualized Educational Programs ("IEPs") on an annual basis. The Council and its members believe it is vitally important to protect the collaborative process through which these IEPs are developed and to promote the educational opportunity and achievement of all students—those with disabilities and those without. Maintaining the Court's workable interpretation of the statutory definition of a "free appropriate public education" ("FAPE") is critical to these goals.

SUMMARY OF ARGUMENT

While Congress has not changed the statutory definition of "free appropriate public education" ("FAPE") in the 34 years since *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176 (1982), the standard established by the Court continues to be an important part of the national effort to raise expectations and increase educational opportunities for students with disabilities.

By adding new requirements for IEPs, Congress has encouraged school districts to better serve students with disabilities. When reauthorizing IDEA in 1997, for example, Congress added various references to progress in the IEP requirements, including how the child's progress toward meeting annual goals will be measured, when periodic reports on the child's progress will be provided, and a statement of the special education-related services and supplemental aids and services to be used to enable the child to make progress in the general education curriculum. But, IDEA does not establish a private remedy for the failure to ensure any particular

educational outcome or to provide a specific degree of educational benefit for a student with a disability.

Rather, in a series of separate federal laws since *Rowley*, Congress has required states to establish systematic accountability for the educational outcomes of all students, including students with disabilities. As a result of these accountability systems, along with the strengthened IEP requirements from the 1997 and 2004 amendments to IDEA, educational opportunities for students with disabilities are better now than ever. This makes it unnecessary to change the *Rowley* inquiry, which asks whether an IEP, otherwise meeting all the statutory and regulatory requirements, is "reasonably calculated to enable the child to receive educational benefits[.]" 458 U.S. at 207.

The federal courts, moreover, are ill-equipped to ascertain what particular level of educational benefit is appropriate for individual students. Adopting petitioner's unworkable standard, which, contrary to *Rowley*, seeks to define a particular level of educational benefit required for all students with disabilities is unnecessary and ill advised, particularly in the face of the statutory changes that *have* been made by Congress. During the collaborative IEP process, parents and professional educators grapple together with many complex variables designed to ensure educational benefits are provided to students. These discussions take into consideration the nature and degree of each student's disability (or disabilities), the level of each student's prior academic achievement, and each state's distinct educational standards. In addition, these discussions address multiple other domains including

social, emotional, psychological, behavioral, as well as medical and health-related issues. In this context, attempting to determine whether a student would have "substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society" (Pet. Br. 41 n.8) (or whether the student was likely to make "significant educational progress" (Gov't Br. 7, 9)) would be an overwhelmingly complex and highly subjective judgment. Instead, consistent with Congress's decision in adopting and repeatedly amending IDEA, the courts should continue to guarantee that the increasingly demanding components of IEPs are in place and otherwise defer to professional educators' determinations of the level of educational benefits that one should anticipate for any particular child.

Across all of the circuits, regardless of the adjective used by appellate courts to describe "educational benefits," Council members strive to maximize the educational benefits provided to all students, including those with disabilities, and petitioners' proposed standard would redirect those efforts. Expanding a private remedy for parents of students with disabilities who are unsatisfied with the progress achieved by their children in public schools would undermine the school's role in IDEA's collaborative process. The result would be to increase both litigation and unilateral private placements. Both of these actions would divert significant resources from school districts' efforts to educate other students with disabilities and those without. Such a diversion is particularly problematic given that Congress has never lived up to its promise to fund 40 percent of the extra costs associated with

special education. As a result of this failure, the bulk of special education funding comes from state and local revenues, but those funding levels also have declined. Driving up private placements and encouraging litigation would harm the education of all students.

Litigating over the right amount of educational benefit to be expected for individual students with disabilities is not the best way to improve education. Rather, educators should be accountable for implementing IDEA's complex procedural requirements, including ongoing monitoring, to ensure that a disabled child's progress is adequate. And, they should be accountable for the educational outcomes of *all* students through mandatory state accountability systems.

For these reasons, the judgment of the court of appeals should be affirmed.

ARGUMENT

I. The Existing Statutory Framework Appropriately Promotes Educational Opportunities for All Students, Including Students with Disabilities.

This is a statutory-interpretation case. Specifically, the Court is asked again to decide what Congress meant when it required the provision of a FAPE to children with disabilities. 20 U.S.C. § 1412(a)(1)(A). IDEA contains an express definition of FAPE:

> The term "free appropriate public education" means special education and related services that—

> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(9).

Moreover, this Court in *Rowley* has already interpreted Congress's multi-faceted definition of FAPE. That interpretation should control the outcome of this case. There is no reason to revisit *Rowley*, nor any justification for abandoning the Court's cogent statutory analysis.

A. "Free Appropriate Public Education" is a term expressly defined by Congress, and *Rowley* appropriately deferred to that congressional intent.

Faced with a strikingly similar issue and nearly identical request, this Court in *Rowley* declined the invitation to substitute its own definition of FAPE for the one adopted by Congress. The standard offered by petitioner here should fail for the same reasons.

1. In *Rowley*, this Court determined that Congress's express definition of FAPE controls. The student in *Rowley* offered a critique of Congress's definition of FAPE similar to petitioner's here, asserting "that the statutory definition is not 'functional' and thus 'offers judges no guidance in

their consideration of controversies involving "the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education."'" *Rowley*, 458 U.S. at 187.

Rejecting this argument, the Court described itself as "loath to conclude that Congress failed to offer any assistance" in defining FAPE, especially when Congress explicitly defined the term in question. *Id.* Though the definition may tend "toward the cryptic rather than the comprehensive," "that is scarcely a reason for abandoning the quest for legislative intent." *Id.* at 188; *see also id.* ("Whether or not the definition is a 'functional' one, as respondents contend it is not, it is the principal tool which Congress has given us for parsing the critical phrase of the Act."[3]).

The Court accurately described the statutory provision as a "definitional checklist," identifying the procedural items that must be accomplished to provide a FAPE. *Id.* at 189. The Court also confirmed that IDEA as a whole was enacted to improve *access* to education through the adoption of "*procedures* which would result in individualized consideration of and instruction for each child." *Id.* (internal quotation marks and citations omitted).

2. Petitioner's proposed standard here should be rejected for the same reasons as the proposed definition in *Rowley*.[4] As respondent explains in

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[3] This observation from the *Rowley* Court is particularly apt, in light of petitioner's description of the newly minted standard as "eminently workable." Pet. Br. 43.

[4] In fact, it is difficult to decipher any difference between petitioner's articulated standard of "substantially equal opportunity" and "commensurate with the opportunity provided

detail (at 27-37), petitioner's proposed standard ("substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society," Pet. Br. 41 n.8) finds no support in IDEA's text, and certainly none in *Rowley*.

Trying to tie the new proposed standard to *Rowley*, petitioner asserts (at 43) that the articulation of "opportunities to achieve academic success, attain self-sufficiency, and contribute to society" somehow comports with *Rowley*'s statement about "meaningful" access.[5] This unsupported assertion, however, underscores that the use of any adjective or modifier to describe a specific level of educational benefit is inconsequential. No matter whether "some," "substantial," "meaningful," or

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other children," which was the standard rejected in *Rowley*, 458 U.S. at 198-200. The Court was appropriately critical of the word "equal," because it could, in some instances, deprive disabled children of necessary services and, in other instances, require more from districts than IDEA requires. *See id.* at 198-99 ("The theme of the Act is 'free appropriate public education,' a phrase which is too complex to be captured by the word 'equal' whether one is speaking of opportunities or services.").

[5] Reliance on *Rowley*'s use of the word "meaningful" is entirely misplaced. Indeed, that word appears only once in the entire majority opinion and, notably, it does not appear in the section of *Rowley* discussing the FAPE definition or standard. Instead, it appears in a discussion of the congressional intent behind IDEA—increasing access to education—in a sentence that explicitly recognizes that Congress *rejected* the imposition of a standard that would require a particular level of educational benefit. *Rowley*, 458 U.S. at 192 ("But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful.").

another descriptor is discussed, petitioner fails to establish any difference in actual application. Furthermore, petitioner and the United States spend substantial effort trying to explain why each of their proposed new descriptors for "educational benefit" would best further their interests, even though the *Rowley* Court rejected the use of such a modifier in accordance with IDEA's text.

Instead, the Court prescribed a clear articulation of the test for evaluating an IEP: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures *reasonably calculated* to enable the child to receive educational benefits?" *Rowley*, 458 U.S. at 206-07 (emphasis added and footnotes omitted). Petitioner overlooks "reasonably calculated" in favor of trying to inject a subjective adjective before "educational benefits" and, in doing so, inappropriately shifts the inquiry *away* from an IEP team's actions and *onto* a student's educational outcomes.

This Court should reject, for a second time, an attempt to judicially amend Congress's express definition of FAPE.

B. IEPs are created through an interactive process involving students, families, and professionals.

This Court's rejection in *Rowley* of a required level of educational benefit and its refusal to deviate from Congress's express definition of FAPE is also sound from a policy perspective because of IDEA's demanding IEP requirements. As "the centerpiece of the [IDEA's] education delivery system for disabled children," *Honig v. Doe*, 484 U.S. 305, 311 (1988), the

IEP is an interactive, evolving, and detailed process. As the Court recognized in *Rowley*, "[e]ntrusting a child's education to state and local agencies does not leave the child without protection." 458 U.S. at 208.

The "core of [IDEA] . . . is the cooperative process that it establishes between parents and schools." *Schaffer v. Weast*, 546 U.S. 49, 53 (2005); *see also Rowley*, 458 U.S. at 205-06 (Congress gave "parents and guardians a large measure of participation at every stage of the administrative process"). As the Court stated in *Schaffer*, the "central vehicle for this collaboration is the IEP process," and parents and guardians "play a significant role" in the process. 546 U.S. at 53. From its very outset, for each individual child, the content of an appropriate education is defined collectively in an IEP by a team that includes (among others) the parents and teachers of the student. *See* 20 U.S.C. § 1414(d)(B); *Honig*, 484 U.S. at 311. This process now also takes place in the context of mandated state accountability systems that demand high expectations for students with disabilities, low-income students, as well as students from major racial and ethnic backgrounds. 20 U.S.C. § 6301.

IDEA's collaborative process also is dynamic rather than static. Parents are involved in the ongoing process of evaluating the implementation of the child's educational program and revising IEPs. Whenever parents believe, during a school year, that their child's IEP requires revision because of, for example, "any lack of expected progress" (based on periodic formal progress reports or other information) or "the child's anticipated needs," they may request that the IEP team convene and review the IEP and

consider revising it to meet the child's needs. 20 U.S.C. § 1414(d)(4)(A). Or the parents and the school district may agree to develop a written document amending the IEP during the school year without convening an IEP meeting. 20 U.S.C. § 1414(d)(3)(D). And at a minimum, the whole IEP team is required to meet at least annually, including the parents, formally reviewing whether the plan's goals are being achieved and revising the IEP as needed. 20 U.S.C. § 1414(d)(4)(A). The team also considers the results of reevaluations of the child and other new information about the child and his or her needs, including any such information submitted by the parents. 20 U.S.C. § 1414(d)(3)-(4).

IDEA's emphasis on prompt cooperative solutions imposes obligations on school districts and parents alike to ensure their good-faith commitment to a truly collaborative process. Indeed, school districts frequently agree to private placements where they are unable to provide an appropriate educational program themselves. *See* 20 U.S.C. § 1412(a)(10)(B); *see also infra* Section III.B. (discussing private placement cost). School districts voluntarily expend hundreds of millions of dollars in state and local revenue on agreed private placements, which occur when the collaborative process established by the Act is operating as it is intended.

C. Congress has strengthened the requirements for IEPs, thereby demanding higher expectations for students with disabilities in the 34 years since *Rowley*.

Petitioner points to several of IDEA's provisions concerning IEPs and acknowledges that these have

been amended to advance some of the same goals behind petitioner's proposed new definition of FAPE. *See, e.g.*, Pet. Br. 37-38, 42-43. These amendments, however, do not suggest that Congress expects the Court to change the definition of FAPE, but rather they indicate congressional intent to improve educational outcomes for students with disabilities through legislative enhancements to the IEP process. For example, when Congress reauthorized IDEA in 1997, it required the IEP to include provisions for measuring the student's progress toward annual goals, for establishing periodic progress reports, and for discussing the services to be used to assist the student with functioning in the general education curriculum. *See* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 614, 111 Stat. 81 (1997) (codified at 20 U.S.C. § 1414). These amendments have allowed Congress to improve educational opportunities without creating the negative consequences risked by petitioner's approach (discussed *infra* Section III).

Moreover, it is undisputed that Congress repeatedly has chosen *not* to amend the actual definition of FAPE contained in IDEA when it made these other changes. Petitioner is thus wrong as a matter of statutory interpretation: "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009); *see also Kucana v. Holder*, 558 U.S. 233, 249 (2010) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress

acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original)).

Judicial amendment of an express statutory definition is improper, especially when Congress amended several provisions of the same statute but chose to retain its original definition of the term at issue. Moreover, it is especially unnecessary here, since Congress has purposely used other amendments to the same statute to improve opportunities for students with disabilities.

D. Federal statutes, adopted since *Rowley*, require states and school districts to be accountable for the academic progress of all students, including students with disabilities.

In addition to strengthening the IEP process for students with disabilities, Congress has also raised the level of accountability that states and school districts have for the educational outcomes of all students. Congress accomplished this, not through changes in IDEA, but rather through a dramatic restructuring of the Elementary and Secondary Education Act ("ESEA"), the principal federal education program designed to improve the academic achievement of disadvantaged students. As the Court noted in *Rowley*, 458 U.S. at 179-80, it was through ESEA that Congress initially sought to address the needs of students with disabilities, before replacing a grant program under that statute with the Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175, Part B, and ultimately IDEA. Again, in 2001, Congress sought to bolster educational opportunities provided under IDEA by new amendments to ESEA.

When ESEA was reauthorized through the No Child Left Behind Act of 2001 ("NCLB"), Congress mandated that states develop and implement accountability systems that included high standards for all students and annual assessments. Pub. L. No. 107-110, 115 Stat. 1425 (2002). Under NCLB, state accountability systems had to annually analyze progress for all students, but also for specified subgroups, including students with disabilities. *Id.* at 115 Stat. 1446. NCLB required that 95% of students be included in yearly assessments. *Id.* at 115 Stat. 1448. Moreover, students with disabilities had to be assessed using the same tests as other students, except for the 1% of students with the most significant cognitive disabilities for whom an alternate assessment could be used. 34 C.F.R. 200.13(c)(2). By requiring the same educational outcome expectations for all students, NCLB demanded that educators hold high expectations for students with disabilities.

In 2015, Congress amended the NCLB, reauthorizing ESEA through the Every Student Succeeds Act ("ESSA"). 20 U.S.C. § 6301. While ESSA made a number of changes to NCLB, principally shifting authority in several areas back to the states, it also maintained the key requirements that states have accountability systems that include annual testing, assess 95% of students, use the same assessments for students with disabilities, permit only 1% of students with the most significant cognitive disabilities to participate in alternate assessments (absent a federally approved state waiver), and report disaggregated data for subgroups, including students with disabilities. 20 U.S.C. § 6311(c)(4)(E)(ii)(I); 20 U.S.C. § 6311(b)(2)(B)(xi)(II);

see also 34 C.F.R. 200.104(b)(3) (promulgating the most recent regulations implementing ESSA's statutory directives).

Congress rejected the idea of setting a specific benefit or defining national educational standards for individual students, including students with disabilities, as the above provisions continue to ensure that educational-outcome expectations for all students must remain high.

Moreover, the *state* educational outcome standards required by NCLB and ESSA do not provide guarantees to individual students. Rather, they are used to direct state and federal resources toward the improvement of lower performing schools. As a result, the remedies available under both NCLB and ESSA are quite different than the private placements allowed under IDEA for a denial of FAPE. First, the remedies are systemic and not private. *See* 20 U.S.C. § 6573(a)(2). Unlike IDEA, NCLB and ESSA provide no private right of action. *See, e.g.*, *Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199, 209-14 (3d Cir. 2008) (holding there is no private right of action under NCLB). Second, the remedies are designed to improve the public education offered to all students, rather than to provide an individual student with educational opportunities in a private-school setting. *Id.* The essential aim of both NCLB and ESSA is to require states and school districts to take action to improve the educational opportunities provided at schools where the educational outcomes of all students or students in particular subgroups (like students with disabilities) need improvement.

Thus, above and beyond the requirements of IDEA, these other federal laws require high expectations and enhanced services for all low performing students, including those with disabilities. Under NCLB in 2002 and now ESSA in 2015, state accountability systems shine a light on schools and programs that are successfully educating all students, but also reveal places where targeted interventions are needed and achievement must be improved.

II. Federal Courts Are Ill-Equipped to Second Guess the Complex Educational Judgments Made Through the IEP Process.

Education professionals are best situated to facilitate the complex collaborative process required to develop and refine effective IEPs.

A. The nature and degree of educational progress to be expected is highly variable because of differences among students, variations in state educational standards, and the number of relevant domains required to be evaluated.

The process of developing an IEP is by definition highly individualized and also complex. Therefore, it is not feasible for courts to quantify the precise amount of educational benefit or outcome that should be expected of every student.

First, every student is different, as is every student that is entitled to special education services. The nature and severity of each student's disability varies greatly. As this Court acknowledged, IDEA requires states and school districts "to educate a wide spectrum of . . . children, from the marginally

hearing-impaired" to students with severe cognitive impairments. *Rowley*, 458 U.S. at 202. The reasonable expectations for a student with a moderate disability may be dramatically different than those for a student with a more profound condition. As the Court noted, the "benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between." *Id.* For some students with disabilities, it is reasonable to expect their academic progress will match or outpace their non-disabled peers. *Id.* at 185 (where a deaf child performed better than the average child in her class and was advancing easily from grade to grade). For others, great progress may entail accomplishing far more simple tasks, including "even the most simple self-maintenance skills." *Id.* at 202. Moreover, many students have multiple disabilities that affect their progress in differing ways. All of these factors are taken into account in the development of an IEP, and they make it impossible to establish a uniform, judicially-enforceable standard of required progress.

Students' progress is also monitored across multiple domains. The educational benefits provided under IDEA are not purely academic. To the contrary, IEP teams evaluate not just academic outcomes, but social, emotional, psychological, behavioral, medical, and health-related progress as well. Students may make great progress in some domains, while occasionally regressing in others. In some circumstances, improvements in non-academic areas form the foundation for future academic progress. The fact that school districts provide

educational benefits across a broad range of needs makes it even more difficult to define the level of "educational benefits" required. Indeed, the educational benefits provided under IDEA span many domains and are measured in many different ways. And, for some students, a "reasonably calculated" IEP may legitimately contemplate different levels of progress in different areas.

Even in the realm of purely academic progress, it would not be a simple matter for federal courts to assess the adequacy of the educational benefits provided. For example, every state has its own distinct academic standards. Different states also use different assessments. IEP teams, collaboratively with parents, determine the individual participation in alternate achievement standards and alternate assessments. Moreover, statewide standards and assessments are frequently changed. Indeed, since November 2014, at least 15 states have changed their assessment systems. *See* Julie Rowland Woods, *State Summative Assessments: 2015-16 school year*, Education Commission of the States, November 2015, *available at* http://www.ecs.org/ec-content/uploads/12141.pdf; *see also* Tonette Salazar, *50 Ways to Test: A look at state summative assessments in 2014-15*, Education Commission of The States, November 2014, *available at* http://www.ecs.org/clearinghouse/01/16/06/11606.pdf. Professional educators and parents are far more familiar with state and local standards and assessments and are better positioned to evaluate together a student's progress on an annual, or even more frequent, basis.

B. This court should follow its long history of deferring to educators' professional judgment.

Because of the extensive protections built into the IEP process and the complexity of educating students with disabilities, this Court in *Rowley* appropriately held that courts should defer to the judgment of professional educators about the degree of educational benefit that must be provided under IDEA. *Rowley*, 458 U.S. at 206 ("[T]he provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.").

The Court has repeatedly "cautioned that courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" *Id.* at 208 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. at 42).[6] The precise degree of educational benefits

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[6] The Court has recognized that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Wood v. Strickland*, 420 U.S. 308, 326 (1975) ("It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion."); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971) ("School authorities are traditionally charged with broad power to formulate and implement educational policy . . . ."); *Epperson v. State of Ark.*, 393 U.S. 97, 104 (1968) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint."); *see also Fisher v. Univ. of Texas at Austin*, 579 U.S. ____, 136 S. Ct. 2198, 2208 (2016) ("Once,

across multiple domains that is to be expected for individual students with a variety of disabilities operating under numerous shifting state education standards is clearly one such question.

III. Petitioner's Proposed Standard Is Not Only Inconsistent with Congress's Express Intent, But It Also Would Be Harmful to Students.

The Council, like all parties involved in this case, desires a result that provides the best possible outcomes for education of all students. Petitioner seeks that result by proposing a judicial amendment to a statutory definition that petitioner believes will alter litigation outcomes. The Council strongly believes, however, that educational outcomes for all students are best protected through the broad-based procedural and systematic protections found in the several federal statutes discussed above.

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however, a university gives a reasoned, principled explanation for its decision, deference must be given to the University's conclusion, based on its experience and expertise . . . ." (internal quotations and citations omitted)); *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 707 (2010) (explaining that the Court was "[d]eferring broadly to the law school's judgment about the permissible limits of student debate."); *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003) ("The Court defers to the Law School's educational judgment that diversity is essential to its educational mission. The Court's scrutiny of that interest is no less strict for taking into account complex educational judgments in an area that lies primarily within the university's expertise.").

A. Petitioner proposes an unworkable standard that would require a subjective evaluation of educational outcomes.

Petitioner purports to accept the *Rowley* prohibition on reading an educational outcome guarantee into the definition of FAPE, Pet. Br. 49-50, yet the operational application of petitioner's proposed standard effectively mandates an impracticable inquiry into the specific educational outcomes expected of each student with a disability. The United States, in support of petitioners, even more blatantly proposes a standard that would require "significant educational progress" for students with disabilities. Gov't Br. at 7, 9.

The standards proposed by both petitioner and the United States would effectively require an unworkable judicial inquiry into whether every student with an IEP is making sufficient academic progress compared to his or her non-disabled peers. Indeed, petitioner discusses the level at which students with disabilities should be achieving, and highlights that a recent guidance document from the U.S. Department of Education encourages an "emphasis on grade-level achievement." *See* Pet. Br. 45-47.[7] Thus, despite petitioner's stated position of avoiding an analysis of educational outcomes, the practical application of either the standard proposed

[7] As discussed above, the Court in *Rowley* expressly rejected grade level achievement as a workable standard for all students with disabilities. *See supra* at 18.

by the United States or that proposed by petitioner would require such scrutiny.[8]

This Court's rejection of a very similar standard in *Rowley* also illustrates that petitioner's proposed standard would require such an unworkable analysis. As discussed, *supra* at 8 n.4, "substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society" (Pet. Br. 41 n.8) is strikingly similar to "commensurate with the opportunity provided other children." *Rowley*, 458 U.S. at 198. *Rowley* rejected that standard as unworkable. Petitioner's proposed standard here similarly would upend the IEP process and create an untenable situation for the educational professionals trying to develop appropriate strategies to help their students in the best ways possible.

B. Petitioner's standard would increase litigation and result in increased private placements, both of which are expensive.

Petitioner attempts to take a standard that this Court described as a "procedural checklist" and inject into it a subjective term, "substantially equal," thereby requiring a detailed analysis of the level of educational benefits in several areas that would be required for all students with disabilities. Such a standard invites litigation. Parents would now be told that they have a potential judicial remedy if they do not believe their child's IEP will provide him or her "with substantially equal opportunities to

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[8] As discussed *supra*, the *Rowley* Court was particularly critical of the word "equal" with respect to IEPs, making petitioner's recent decision to propose this standard even more curious. *Rowley*, 458 U.S. at 198-99.

achieve academic success, attain self-sufficiency and contribute to society." Pet. Br. 14. It is difficult to see how a court (or administrative law judge) will be able to efficiently adjudicate such claims, because petitioner's standard is highly subjective and complex. How is a court to define "substantially" or measure the opportunity for achieving academic success, self-sufficiency, or societal contribution?

The resulting likelihood of increased litigation and the likelihood of more protracted litigation are problematic. First, of course, such litigation imposes direct financial burdens on school districts. The dollars that districts must dedicate to litigation are dollars that could otherwise be used to provide additional services to all students, including the students with IEPs. Second, a dramatic increase in litigation risk has the corollary detriment of increased insurance premiums. Once again, no matter whether the financial costs are direct or indirect, increased litigation costs deplete the limited budgets through which districts provide services to all students. This is particularly unfortunate when there are other safeguards already in place that do a superior job protecting the rights of students with disabilities.

Moreover, in the event parents unilaterally elect to place their child in a private school at their own expense, the parents are entitled to reimbursement if the public school district is unable to provide a FAPE and the private school can provide an appropriate education. 20 U.S.C. § 1412(a)(10)(C). Thus, altering the definition of FAPE has a dramatic impact on the funds a district must expend to cover private education. Educational services provided to students with disabilities in a private setting cost a public

school district, on average, nearly five times what it costs to provide the services within-district. Jay G. Chambers et al., *What Are We Spending on Special Education Services in the United States, 1999-2000*, at 12 (updated June 2004), *available at* http://www.csef-air.org/publications/seep/national/advrpt1.pdf. Indeed, the most comprehensive study on this topic found that—in the year 2000—"special education spending on a school-aged student served in programs outside the public schools amounted to $26,440," including the cost of tuition. *Ibid.* "In contrast, special education spending on direct instruction and related services for school-aged students served within public schools amounted to $5,709 per pupil." *Ibid.*

Internal survey data from Council members for school year 2015-16 reflect even higher costs for private school placements. In the Los Angeles Unified School District, the second-largest school system in the nation with an enrollment of 557,632 students, the average per student annual cost for day program placements is $29,663. For the Chicago Public Schools, with 381,349 students, the average per student cost for such placements was even higher at $44,106. Comparatively, for Providence Public Schools, a smaller urban school district of 23,867 students, the average per student annual cost for day program placements is $41,371. And, the Anchorage School District, with a student population of 47,207, has a per-student annual cost for day program placements of $67,806. Despite vast differences in student enrollment, the highest out-of-district day program cost was $73,354 for Providence, $75,182 for Los Angeles, and $87,326 for Chicago.

The annual total cost of these placements is substantial. For example, this annual aggregate expenditure was $12.3 million in Providence and $93.4 million in Los Angeles. Out-of-district placements thus have a staggering financial impact on urban school systems across the country.

In part as a result of such placements, the total cost of special education constitutes a large portion of the overall budgets of urban public schools. For example, special education costs account for 18.5%, or $98.2 million, of the total annual operating budget in Des Moines Public Schools, 20.0%, or $1.5 billion, in Los Angeles, and 25.5%, or $568.2 million, in the Clark County School District (Las Vegas).

With approximately 13% of students nationwide served pursuant to IEPs, the costs associated with the dramatic change in the definition of FAPE proposed by petitioner would likely be astronomical. *See* National Center for Education Statistics, Children and Youth with Disabilities (last updated May 2016), http://nces.ed.gov/programs/coe/indicator_cgg.asp.

Increased unilateral private placements can be problematic for other reasons as well. For example, when students are placed in private institutions offering services to only students with disabilities, or to only students with a particular disability, such a placement may be in tension with Congress's explicit goal in IDEA to educate students with disabilities with their non-disabled peers in the least restrictive environment. *See* 20 U.S.C. § 1412(a)(5). *See also C.G. ex rel. A.S. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 285 (1st Cir. 2008) ("It is common ground that the IDEA manifests a preference for

mainstreaming disabled children."); *Indep. Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 561 (8th Cir. 1996) (IDEA's "strong preference" that students with disabilities be educated in their least restrictive environment "gives rise to a presumption in favor of . . . placement in the public schools"). In some private placements, mainstreaming is simply not possible.

Once again, all of this cost risk and educational risk is unnecessary, because other forms of federal and state oversight regulate educational outcomes for all students. *See supra* Section I.D.

C. Petitioner's desired changes to the definition of FAPE come at a time when public education budgets are being severely cut, and IDEA has never been fully funded.

Petitioner's proposed change also comes at a time when districts across the nation face crippling budget cuts. Ever since the 2008 recession, public school districts have been under extraordinary pressure. In fact, "[a]t least 31 states provided less state funding per student in the 2014 school year . . . than in the 2008 school year." Michael Leachman et al., *Most States Have Cut School Funding, and Some Continue Cutting*, Center on Budget & Policy Priorities, at 1 (Jan. 25, 2016), *available at* http://www.cbpp.org/sites/default/files/atoms/files/12-10-15sfp.pdf. Local government funding of public education fell over the same period. As of 2016, at least 25 states are still providing less "general" or "formula" funding (which is the primary source of state school funding) per student than in 2008. *Id.* "In seven states, the cuts exceed 10 percent." *Id.*

Petitioner's proposed standard is a financial load that public school district budgets simply cannot bear. As discussed above, it is telling that Congress never sought to amend the definition of FAPE to make private remedies more broadly available but instead enhanced IDEA's procedural requirements and safeguards for individual students and created systemic remedies under ESSA. It is also notable that this purposeful congressional *in*action on the FAPE definition coincides with Congress's decision not to fund IDEA at the intended level. Indeed, the statute calls for the federal government to fund up to 40% of the differential that public school districts incur providing services to students with disabilities. 20 U.S.C. § 1411(a)(2)(A)-(B). Congress has never funded that full amount, currently funding approximately 17% of the differential. Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. Nat'l Ass'n Admin. L. Judiciary 423, 448 (2012).

If Congress wishes to change the definition of FAPE in a way that dramatically increases the cost of special education, it will face significant public pressure to raise federal funding levels as well. Similarly, the Court, without the ability to increase such funding, should not adopt a costly definitional change that Congress has not.

D. The Court should allow educators to maintain their focus on efforts for student success, not on the avoidance of litigation.

IEPs are created through an interactive process among, *inter alia*, educators, parents, students, and health-care providers. Every one of these constitu-

ents is doing his or her best to improve the performance and opportunities for students with disabilities. Petitioner has not provided any evidence supporting the notion that individual educators—those developing IEP plans—aim to provide inferior outcomes to their students based on the circuit court jurisdiction in which they live. In fact, as respondent points out, there is no credible evidence that outcomes even vary between jurisdictions that allegedly apply different judicial standards. *See* Br. in Opp. 12-16.

What petitioner now proposes is to take Congress's enhanced procedural requirements and safeguards—something educators can readily apply—and turn them into an unworkable measure of whether they are providing "substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society" (Pet. Br. 41 n.8). As petitioner cannot provide an explanation as to how this term would be applied in litigation, it is unwise to force it upon educators.

A litigation remedy is not the solution to the "problems" petitioner perceives. Congress has never seen fit to change the definition of FAPE, and the Courts should not intervene to do so. *Rowley* provides cogent guidance on how to apply Congress's express language, and the Court should not waiver from *Rowley*. Educators should be allowed to preserve their primary mission of delivering educational services to all students rather than being diverted to implement the petitioner's new judicially created legal standard for a FAPE.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JULIE WRIGHT HALBERT
COUNCIL OF THE GREAT CITY SCHOOLS
1331 Pennsylvania Ave., N.W., Suite 1100N
Washington, DC 20004
(202) 393-2427
jwh@cgcs.org

JOHN W. BORKOWSKI
Counsel of Record
HUSCH BLACKWELL LLP
120 South Riverside Plaza
Suite 2200
Chicago, IL 60606
(312) 655-1500
john.borkowski@huschblackwell.com

DEREK T. TEETER
MICHAEL T. RAUPP
HUSCH BLACKWELL LLP
4801 Main St., Suite 1000
Kansas City, MO 64112
(816) 983-8000

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ENDREW F., a minor, by and through his parents and next friends, JOSEPH F. and JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* DELAWARE, MASSACHUSETTS, AND NEW MEXICO IN SUPPORT OF PETITIONER

MATTHEW P. DENN
Attorney General
STATE OF DELAWARE

AARON R. GOLDSTEIN
State Solicitor
PATRICIA A. DAVIS*
Deputy Attorney General
LAURA B. MAKRANSKY
Deputy Attorney General
DELAWARE DEPARTMENT OF JUSTICE
820 North French Street
Wilmington, Delaware 19801
(302) 577-8400
PatriciaA.Davis@state.de.us

**Counsel of Record*

[Additional Counsel Listed On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

MAURA HEALEY
Attorney General
COMMONWEALTH OF MASSACHUSETTS
One Ashburton Place
Boston, Massachusetts 02108

HECTOR H. BALDERAS
Attorney General
STATE OF NEW MEXICO
P.O. Box 1508
Santa Fe, New Mexico 87504

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INTEREST OF THE *AMICI CURIAE*

The level of educational benefit required by the Individuals with Disabilities Education Act profoundly affects the quality of the education children with disabilities receive. *Amici* have a compelling interest in ensuring that children who require special education and related services receive a free appropriate public education that helps them fulfill their potential and prepares them for the future. *Amici* implore this Court to find that the highest level of educational benefit for children with disabilities currently recognized by federal courts of appeal is the correct level for all of the nation's children with disabilities in order to ensure that the IDEA's ideals of equality of opportunity, full participation, independent living, and economic self-sufficiency are fulfilled.

STATEMENT

The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, provides federal money to assist states in educating children with disabilities. To qualify for this program of federal assistance, a state must demonstrate, through a detailed plan submitted for federal approval, that it has policies and procedures in effect that assure all eligible children the right to a free appropriate public education ("FAPE") tailored to the unique needs of each child by means of an individualized education program ("IEP"). *See* 20 U.S.C. § 1412(a)(2), (4). In 1982, this Court

determined that every IEP must be reasonably calculated to ensure a child receiving special education and related services acquires an educational benefit but expressly declined to define the appropriate level of educational benefit required. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203-04 (1982). Since that time, some courts of appeal, like the Tenth Circuit here, have interpreted the *Rowley* decision to require only that special education services provide "more than a *de minimis*" educational benefit. Other courts of appeal, such as the Third and Sixth Circuits, have interpreted *Rowley* to require a showing that a child's IEP provides "meaningful" benefit before finding the child's education appropriate under the IDEA.

SUMMARY OF ARGUMENT

The question before this Court – whether a special education student's IEP must be tailored to provide meaningful educational benefit or just more than *de minimis* benefit – has been characterized by the Respondent as an academic debate of semantics. Br. in Opp'n to Pet. for a Writ of Cert. 12. This characterization highlights the underlying disjunction between the intent of Congress and the decision of the Tenth Circuit in this matter. For the *Amici* and their constituencies, the issue in this case is anything but semantics. Rather, it goes straight to the heart of IDEA's guarantee that children who receive special education services will receive a free *appropriate* public education from the schools in their communities. The language chosen

by the Court in this case will be interpreted and re-interpreted throughout the country and, ultimately, filter down to the training every special education diagnostician receives, affecting every student who receives special education and related services. If the standard of the IDEA in fact requires only more than *de minimis* progress, as the 10th Circuit held, then as a nation we have not assuaged Congress' expressed concern in 1975 that children with disabilities in the United States are "sitting idly in regular classrooms awaiting the time when they [are] old enough to 'drop out.'" *Rowley*, 458 U.S. at 179 (quoting H.R. REP. NO. 94-332, at 2 (1975)). As discussed in Section I below, since this Court decided *Rowley*, the Individuals with Disabilities Education Act Amendments of 1997 and Individuals with Disabilities Education Improvement Act of 2004 have clarified Congress' intent to define a free appropriate public education as requiring meaningful educational benefit. Indeed, it defies common sense to suggest that Congress would impose such procedural and record-keeping requirements for no reason other than to ensure what could be trivial progress. The procedural requirements created by the amendments to the IDEA must be a means to an end. Congress has never stated that merely more than *de minimis* educational benefit is the goal, and the Court should not superimpose such a low standard in direct contradiction to congressional intent. The *Amici*, like all states, have been on notice of Congress' intended heightened standard for almost two decades. As explained in Section II below, the meaningful educational

benefit standard is in the best interest of children receiving special education and related services and is not cost prohibitive. In fact, early intervention with the express goal of obtaining meaningful educational benefit has been shown time and again to benefit children receiving special education and related services, fostering the creation of productive, self-sufficient members of society.

ARGUMENT

I. FOR ALMOST TWO DECADES, STATES HAVE BEEN ON NOTICE THAT A CHILD WITH A DISABILITY IS PROVIDED A FREE AND APPROPRIATE EDUCATION WHEN THE CHILD'S INDIVIDUALIZED EDUCATION PROGRAM CONFERS MEANINGFUL EDUCATIONAL BENEFIT

Under the IDEA, a state may elect to submit a plan that sets forth policies and procedures for ensuring that certain conditions are met in order to be eligible for federal assistance for educating children with disabilities. The state's policies and procedures must reflect that all children with disabilities who reside in the state will be provided a free appropriate public education in addition to the goal of providing full educational opportunity to all children with disabilities. 20 U.S.C. § 1412(a)(1)-(2).

In *Rowley*, the Court reviewed the legislative history of IDEA's predecessor, the Education for All

Handicapped Children Act of 1975 ("EHCA"). The Court found that FAPE under the EHCA "consist[ed] of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from that instruction." 458 U.S. at 188-89. The Court noted that the statutory definition of FAPE includes an "individualized educational program" and that an IEP is the "means" by which FAPE is tailored to each child. *Id.* at 181, 188. The Court held that a state satisfies the FAPE requirement "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203.

When the Court issued the decision in *Rowley*, the focus of federal legislation was to ensure that children with disabilities had access to an education. The Court noted that the EHCA "represent[ed] an ambitious federal effort to promote the education of handicapped children, and was passed in response to Congress' perception that a majority of handicapped children in the United States 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to drop out." 458 U.S. at 180 (quoting H.R. REP. NO. 94-332, at 2 (1975)). The Court also noted that "Congress found that of the roughly eight million handicapped children in the United States at the time of enactment, one million were 'excluded entirely from the public school system' and more than half were receiving an inappropriate education." *Id.* at 189 (quoting 89 Stat.

774). Accordingly, the Court found that "Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education." *Id.* at 200.

Eight years after the *Rowley* decision, Congress refined the stated purpose of the EHCA. In 1990, Congress replaced the term "handicapped children" with "children with disabilities" and changed the name of the EHCA to the IDEA. Education of the Handicapped Act Amendments of 1990, S. 1824, 101st Cong. (1990).

Then, in 1997, Congress amended the IDEA. During the hearings on prospective amendments, one member of Congress stated, "We must ensure the opportunity for children with disabilities to obtain a quality education." *Revision of Special Education Programs, Hearing on H.R. 5 Before the Subcomm. on Early Childhood, Youth and Families of the H. Comm. on Education & the Workforce*, 105th Cong. (1997) (opening statement of the Honorable Frank Riggs). Congress ultimately found that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." Individuals with Disabilities Education Act Amendments of 1997, H.R. 5, 105th Congress, § 1400(c)(1) (1997). Additionally, Congress found that since its enactment in 1975, the IDEA "ha[d] been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results

for children with disabilities." *Id.* at § 1400(c)(3). However, Congress also found that implementation of the IDEA "ha[d] been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." *Id.* at § 1400(c)(4).

One purpose of the 1997 amendments, which continues to remain in place today, was "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." *Id.* at § 1400(d)(1)(A). Congress emphasized that more than twenty years of research and experience showed that having high expectations for children with disabilities make their education more effective. *Id.* at § 1400(c)(5)(A).

To that end, Congress expanded the required components of an "individualized educational program" that were noted by the Court in the *Rowley* decision. *See Rowley*, 458 U.S. at 182 (quoting 20 U.S.C. § 1401(19) (1975)). Although an "individualized educational program" under the IDEA helped to ensure that children with disabilities had access to an education, the 1997 amendments helped to ensure children with disabilities also received meaningful benefit from their education by means of that individualized education program. Specifically, the statement of a child's present levels of educational performance now included: "(I) how the child's disability affects the child's involvement; or (II) for preschool children, as appropriate, how

the disability affects the child's participation in appropriate activities." 20 U.S.C. § 1400(d)(1)(A)(i). Congress also specified that the goals' statement had to include "measurable" goals, including "benchmarks or short-term objectives related to – (I) meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and (II) meeting each of the child's other educational needs that result from the child's disability." *Id.* at § 1400(d)(1)(A)(ii).

Congress added six components that were not required when *Rowley* was decided, including "a statement of the special education and related services and supplementary aids and services to be provided for the child – (I) to advance appropriately toward attaining the annual goals; (II) to be involved and progress in the general curriculum . . . and to participate in extracurricular and other nonacademic activities; and (III) to be educated and participate with other children with disabilities and nondisabled children in [such activities]." *Id.* at § 1400(d)(1)(A)(iii). Relatedly, the IEP had to specify how the child's progress toward these annual goals would be measured. *Id.* at § 1400(d)(1)(A)(viii)(I). Another added component was an explanation of the extent to which a child with a disability would not participate with nondisabled children in a regular class and in nonacademic activities. *Id.* at § 1400(d)(1)(A)(iv). Congress also required a statement concerning any individual modifications in order for a child to participate in State or district assessments, or a statement that a child would not participate in any such

assessments and specific information as to how the child would be assessed. *Id.* at § 1400(d)(1)(A)(v)(I) -- (II). The remaining additional components included statements concerning transition services that were updated annually, and how the child's parents would be informed of the child's progress. *Id.* at § 1400(d)(1)(A)(vii), (viii)(II).

When Congress amended the IDEA again in 2004, it specified additional components to an IEP, including a statement on a child's academic and functional performance. *See* Individuals with Disabilities Education Improvement Act of 2004, H.R. 1350, 108th Congress, § 1414(d)(1)(A)(i) (2004).

Since the IDEA's enactment in 1975, States have been on notice that an IEP is the means by which they provide FAPE to children with disabilities. States that have chosen to submit a plan under the IDEA have been on notice since 1997 that Congress was concerned with how the IDEA was implemented and that, as a result, Congress amended the IEP requirements that existed at the time of the *Rowley* decision to ensure that each child with a disability receive meaningful educational benefit. Effective with the 1997 amendments, an IEP outlined goals that were "measurable" and special education and related services and supplementary aids and services that would help children with disabilities achieve their respective goals. Any contention that Congress intended children with disabilities to show merely *de minimis* benefit contravenes the amendments to the means by which FAPE is achieved.

II. ADOPTION OF THE MEANINGFUL EDUCATIONAL BENEFIT STANDARD IS IN THE BEST INTEREST OF OUR NATION'S CHILDREN WITH DISABILITIES

A. The Meaningful Educational Benefit Standard Is the True and Accurate Embodiment of *Rowley* and Congressional Intent

Courts of appeal holding that an IEP must be reasonably calculated to provide merely more than *de minimis* educational benefit for children requiring special education and related services have provided a significant disservice to many of the nation's children. This low standard evolved from an extremely narrow reading of the Court's decision over thirty years ago in a case involving a very unique child, not indicative of many children requiring special education and related services today[1], and inapposite to Petitioner's educational experience in the instant case.

In *Rowley*, the Court was presented with and expressly confined its analysis to "a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classroom of a public school system." 458 U.S. at 202. In the context of that fact

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[1] *See* OFFICE OF SPECIAL EDUC. AND REHAB. SERVS., U.S. DEP'T OF EDUC., 37TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 140-143 (2015) (charting the percentage of students served under the IDEA by educational environment and state under the categories of emotional disturbance and intellectual disabilities).

pattern, the Court held that a FAPE is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203. The Court expressly noted that "the evidence firmly establishes that Amy [Rowley] is receiving an 'adequate' education, since she performs better than the average child in her class and is advancing easily from grade to grade." *Id.* at 209-10. The development of the "merely more than *de minimis*" standard arises from the Court's statement that individualized services must be sufficient to provide every eligible child with "some" educational benefit. *See Endrew F. v. Douglas Cnty. Sch. Dist.*, 2014 WL 4548439, at *4 (10th Cir. Sept. 15, 2014) (citing *Rowley*, 458 U.S. at 200).

Aggrandizing the word "some" – in a decision involving a child whose academic performance was better than the average child in her class – that only more than *de minimis* educational benefit is required from special education and related services short changes every special education student not blessed with Amy Rowley's cognitive capabilities. As the Third Circuit recognized, "the facts of the [*Rowley*] case (including Amy Rowley's quite substantial benefit from her education) did not force the Court to confront squarely the fact that Congress cared about the quality of special education." *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180 (3d Cir. 1988) (parenthetical in original).

Indeed, although "the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children," it need not follow that *Rowley* determined Congressional intent was to limit the applicable standard to merely more than *de minimis* educational benefit. 458 U.S. at 198 (internal quotation marks and citation omitted). As noted in *Polk*:

> [t]he [Education for All Handicapped Children Act's] sponsors stressed the importance of teaching skills that would foster personal independence for two reasons. First, they advocated dignity for handicapped children. Second, they stressed the long-term financial savings of early education and assistance for handicapped children. A chief selling point of the Act was that although it is penny dear, it is pound wise – the expensive individualized assistance early in life, geared toward teaching basic life skills and self-sufficiency, eventually redounds to the benefit of the public fisc as these children grow to become productive citizens. 853 F.2d at 181-82 (citing H.R. REP. No. 332, at 11 (1975)).

Congress' express goal of fostering personal independence in those children served by the IDEA does not require catastrophic injury to a State's fisc. It occasions the opposite. A myopic hyperfocus on the immediate fiscal impact of providing the kind of education required by IDEA necessarily ignores the length, breadth, and

depth of the fiscal benefit each State receives from assisting in the creation of a member of its community who has been imbued with the kind of education that permits a self-sufficient, productive life. The recognition that early intervention geared toward teaching self-sufficiency inures to the benefit of society as a whole exemplifies the fallacy behind requiring educational benefit that is merely more than *de minimis*.[2]

B. All Children Who Receive Special Education Services Under the IDEA Deserve Meaningful Educational Benefits

The strongest case for a meaningful educational benefit standard cannot be stated any more directly than this: "[L]ow expectations can lead to children with disabilities receiving less challenging instruction . . . and thereby not learning what they need to succeed at the grade in which they are enrolled." OFFICE OF SPECIAL EDUC. AND REHAB. SERVS., U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: CLARIFICATION OF FAPE AND ALIGNMENT WITH STATE ACADEMIC STANDARDS, at 1 (Nov. 16, 2015). Moreover, "[r]esearch has demonstrated that children with disabilities . . . can successfully learn grade-level content and make significant academic progress when appropriate instruction, services, and

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[2] *See, e.g.*, J. K. Torgesen, *Avoiding the Devastating Downward Spiral: The Evidence that Early Intervention Prevents Reading Failure*, AM. EDUCATOR 28, at 6-19 (2004) (detailing the progression of educational development compromises that flow from delayed early reading skills in kindergarteners and first graders).

supports are provided." *Id.* (citing Improving the Academic Achievement of the Disadvantaged; Assistance to States for the Education of Children With Disabilities, 80 Fed. Reg. 50773-01 (Aug. 21, 2015) (to be codified at 34 C.F.R. pts. 200 & 300)). Implementation of the IDEA has been nonetheless "impeded by low expectations" in complete disregard for the "almost 30 years of research and experience [demonstrating] that the education of children with disabilities can be made more effective by having high expectations for such children. . . ." 20 U.S.C. § 1400(c)(5)(A). Requiring an IEP to be reasonably calculated merely to provide more than *de minimis* educational benefit directly contradicts the purpose of the the IDEA. Those courts of appeal embracing this low standard for academic progress are failing children with disabilities in their circuits, denying the existence of the children's capabilities, and ignoring the government's obligation to help these children achieve their full potential.

The instant action exemplifies the inadequacy of the merely more than *de minimis* standard and the disservice that is done to children with disabilities when too little educational progress is expected and an inability to attain success as an adult is presumed. Here, the Tenth Circuit found that despite the fact that Petitioner's IEP contained identical goals year after year, he was receiving more than a *de minimis* educational benefit. *Endrew F.*, 2014 WL 4548439, at *2, *4. Noting that this was, however, a "close case" even under that standard, the Tenth Circuit decision makes clear that had Petitioner resided elsewhere in the

country, in a circuit that has adopted the meaningful benefit standard, his meager educational progress would not have been found appropriate.

Concerned with the widening achievement gap for students with disabilities and in order to fulfill the IDEA's ideals of equality of opportunity, full participation, independent living, and economic self-sufficiency for students with disabilities, the United States Department of Education ("the Department") implemented Results-Driven Accountability ("RDA"), which "shift[ed] the Department's accountability efforts from a primary emphasis on compliance to a framework that focuses on improved results for students with disabilities." U.S. DEP'T OF EDUC., JOINT LETTER EXPLAINING THE RDA FRAMEWORK, at 1 (May 21, 2014). RDA "minimizes State burden and duplication of effort" and "encourages States to direct their resources where they can have the greatest positive impact on outcomes." OFFICE OF SPECIAL EDUC. AND REHAB. SERVS., U.S. DEP'T OF EDUC., RESULTS-DRIVEN ACCOUNTABILITY CORE PRINCIPLES.

Each State develops and implements a State Systemic Improvement Plan ("SSIP") as part of its State Performance Plan and Annual Performance Report under IDEA. The Department created and currently funds the National Center for Systemic Improvement ("NCSI") to provide customized and differentiated technical assistance to each State as it transforms its system to improve outcomes for students with disabilities. Simply stated, the Department has recognized

the need to hold educators accountable for the educational progress of students receiving special education and related services, and has objectively moved away from the concept that inclusion and access is sufficient. Recognizing each State is presented with unique circumstances, the Department has allocated funding that enable States to maximize their own resources and reduce their burden. A judicially created nationwide standard of merely more than *de minimis* educational progress runs counter to the intent of Congress and the implementation that is already occurring.

C. The Meaningful Educational Benefit Standard Is Not Cost Prohibitive

Since its inception in 1975, the IDEA has recognized that "penny dear, pound wise" programs for children who require special education and related services benefit society in the long run as early interventions provide long-term cost savings. *See, e.g.*, J.W. Jacobson et al., *"Cost-Benefit Estimates for Early Intensive Behavioral Intervention for Young Children with Autism,"* 13 BEHAV. INTERVENTIONS 201 (1998) (estimating societal savings over the life of a person with autism of between $1.6 and $2.8 million per person with autism if intervention is widespread, early and effective). Indeed, the Department's Pre-Elementary Education Longitudinal Study assessed almost 3,000 preschoolers who received special education services in school year 2003-04 and found that approximately 16 percent stopped receiving those services each year over a two-year period because they no

longer required special education services. OFFICE OF SPECIAL EDUC. AND REHAB. SERVS., U.S. DEP'T OF EDUC., THIRTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA, 2 (Nov. 2010).

The instant matter involves a question of tuition reimbursement; however, this is not indicative of the majority of special education actions filed each year, nor representative of the needs and desires of an overwhelming majority of parents of students receiving special education and related services.[3] Tuition dependent placements are expensive and, consequently, more likely to be litigated by parents. They are not, however, exclusively the issue before this Court. That is, "meaningful benefit" does not *per se* require placement in a non-public tuition requiring institution and the Court should view skeptically any contention that adopting the "meaningful benefit" standard will result in an overwhelming onslaught of tuition reimbursement demands on the public school system.[4]

In 2008, IDEA-reported data indicated that "95 percent of all students with disabilities were educated in their local neighborhood schools." OFFICE OF SPECIAL EDUC. AND REHAB. SERVS., at 2, *supra* at 14-15. In 2014,

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[3] The Court has recognized that "the incident of private-school placement at public expense is quite small." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009) (citation omitted).

[4] Terry Jean Seligmann, *Sliding Doors: The Rowley Decision, Interpretation of Special Education Law, and What Might Have Been*, 41 J.L. & EDUC. 71, 90 (Jan. 2012) (discussing that districts may, consistent with *Rowley*, choose the appropriate educational approach or methodology that is the least expensive).

only 1.4% of students ages 6 through 21 served under the IDEA were enrolled by their parents in private schools. OFFICE OF SPECIAL EDUC. AND REHAB. SERVS., U.S. DEP'T OF EDUC., 38TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 137 (2016). There is a wide array of services to which a student may be entitled in the public school setting.[5] As the Court recognized in *Rowley*, "courts must be careful to avoid imposing their view of preferable educational methods upon the States." 458 U.S. at 208. The Court further stated, "Once a court determines that the Act's requirements have been met, questions of methodology are for resolution by the States." *Id.* at 197. Simply stated, a holding that an appropriate education must contain demonstrative meaningful educational benefit is not a *carte blanche* endorsement of private school tuition reimbursement from the fisc.

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[5] For examples of the range of services offered under an IEP, see David Ferster, *Broken Promises: When Does A School's Failure to Implement an Individualized Education Program Deny A Disabled Student A Free and Appropriate Public Education*, 28 BUFF. PUB. INT. L.J. 71 (2010).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

MATTHEW P. DENN
Attorney General
STATE OF DELAWARE
AARON R. GOLDSTEIN
State Solicitor
PATRICIA A. DAVIS*
Deputy Attorney General
LAURA B. MAKRANSKY
Deputy Attorney General
820 North French Street
Wilmington, Delaware 19801
(302) 577-8400

Counsel of Record

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IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,

Petitioner,

—v.—

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICI CURIAE BRIEF OF DISABILITY RIGHTS ORGANIZATIONS AND PUBLIC INTEREST CENTERS IN SUPPORT OF PETITIONER

MICHAEL CHURCHILL
LEE AWBREY
PUBLIC INTEREST LAW CENTER
1709 Benjamin Franklin Parkway
Philadelphia, PA 19103
(215) 627-7100
mchurchill@pubintlaw.org

GREGORY J. WALLANCE
Counsel of Record
W. STEWART WALLACE
KAYE SCHOLER LLP
250 West 55th Street
New York, New York 10019
(212) 836-8000
gregory.wallance@kayescholer.com

(*see inside cover for additional appearances*)

Daniel R. Unumb
Autism Legal Resource Center LLC
125 Ashworth Drive
Lexington, SC 29072
(803) 608-1160
danunumb.alrc@gmail.com

Gary S. Mayerson
Maria C. McGinley
Mayerson & Associates
330 West 38th Street, Suite 600
New York, New York 10018
(212) 265-7200
gary@mayerslaw.com

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INTEREST OF THE AMICI CURIAE[1]

Amici are various disability rights organizations and public interest centers whose efforts include litigation, public policy and general advocacy to protect, *inter alia*, the civil rights of persons with disabilities to equal educational opportunities. The *amici* include Autism Speaks; the National Down Syndrome Society (NDSS); TASH; the International Dyslexia Association (IDA); United Cerebral Palsy; the Washington Lawyers' Committee for Civil Rights and Urban Affairs; Decoding Dyslexia chapters, and Public Counsel. Each *amicus* has experience in securing the rights of students with disabilities to free appropriate public educations and has a substantial interest in the outcome of this case. The individual statements of interest of all *amici* appear in the Appendix.

SUMMARY OF ARGUMENT

In support of the 1997 amendments to the Individuals with Disabilities Education Act ("IDEA"), Senator Jim Jeffords testified:

> *[T]he bottom line is that when it comes time to graduate from high school we*

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[1] Pursuant to Supreme Court Rule 37.6, no party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief. Counsel of record for all parties received notice of *amici curiae*'s intention to file this brief more than 10 days before it was due. The parties have filed with the Clerk's office a blanket consent to all amicus briefs.

> *must make sure that our students, all students, have the skills to either pursue post-secondary education or training or to get a good job and be contributing members of our community to the utmost of their ability . . . IDEA was originally enacted in 1975 . . . After 22 years, I think it is appropriate to acknowledge that schools have changed. The range of disabilities seen in schools has changed. Our expectations for children with disabilities have changed. And the expectations we've placed on each other as educators and parents have changed.*[2]

It was almost 35 years ago when the Court last reviewed the appropriate educational standard for children with disabilities under the IDEA as originally enacted in 1975.[3] *Board of Education v. Rowley,* 458 U.S. 176 (1982). As Senator Jeffords eloquently explained in supporting Congress's decision to amend the IDEA in order to improve educational outcomes for those children, the decades following the EHA and *Rowley* ushered in dramatic changes in the participation of persons with

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[2] Testimony of Sen. Jeffords, R-VT, Chairman, Hearing of Senate Labor and Human Resources Committee, Specialized Education Programs Reauthorization, Jan. 29, 1997.

[3] The IDEA was originally enacted as The Education of All Handicapped Children Act ("EHA"), Pub. L. 94-142. It was amended and renamed the IDEA in 1990. Pub L. 101-476.

disabilities at school and in the community. Advances in instructional practices and technologies have improved opportunities for achievement beyond any expectations Congress held when adopting the EHA.

In a series of educational laws beginning in 1994, Congress took note of these advances and raised the standards expected for educational and functional achievement by students with disabilities. Many legislative changes explicitly require students with disabilities to be assessed on the same scales as non-disabled students in mastering the same curriculum. *Amici* here present information on the research-based interventions, instructional practices and technologies which have led Congress to raise standards for educational and functional achievement and permit schools to meet those raised standards.

Resolving the proper standard for determining an appropriate education under the IDEA is crucially important to the futures of countless numbers of children with disabilities, including disproportionately minorities and poor children, as well as their families, and their educators. As set forth below, that resolution should be clear: the IDEA unequivocally requires a higher standard than the "merely more than *de minimis*" educational benefits employed by the Tenth Circuit below.

Even in its original formulation in 1975, the statute did not define the appropriate educational

benefit for children with disabilities as little more than trivial or *de minimis*. To the contrary, Congress intended to provide "full educational opportunities" for all children with disabilities. The Court in *Rowley* also did not adopt a merely more than *de minimis* standard nor any single standard for educational achievement. This is understandable in light of the time *Rowley* was decided. Back in 1982, special education was in its infancy and methods for identifying and effectively educating children with disabilities were still developing. The world – and the EHA (now the IDEA) – has dramatically changed since *Rowley*. There has been a broad movement in national education policy that shifted the focus from mere access to education to an emphasis on improved educational outcomes and standards for all students, including those with disabilities.

Congress codified this effort in a string of legislation – including two robust amendments to the IDEA in 1997 and 2004 – that increasingly emphasized moving beyond the low expectations of just providing children with disabilities with a desk and a teacher, to demanding high educational expectations for them consistent with that provided non-disabled students. New legislation focused on preparing students for further education, employment and independent living. Whatever the appropriate educational standard may have been for children with disabilities thirty-five years ago, it is crystal clear that the amended IDEA now calls for a far more robust standard.

These Congressional changes did not occur in a vacuum. Expectations rose from data demonstrating that educators had the capacity to meet higher standards. Progress in educating students with disabilities has in fact changed the understanding of what is possible and practicable and thus what constitutes meaningful progress in light of a child's abilities. Research-based science has provided effective methods to help children with disabilities learn that were just being developed at the time of *Rowley*. Advancements in assistive technology have game-changing benefits for children with a wide range of disabilities when combined with evidence-based practices. And implementation of such researched-based practices, which is required "to the extent practicable" by IDEA is fully workable as demonstrated by the wealth of information available and the experience of many public schools.

To ensure the performance levels meet the high standards Congress intended, a school must set measureable goals. These goals must be designed in light of peer-reviewed research and available technological advancements, and must include opportunities for children with disabilities to participate in the general curriculum so that they have a substantially equal opportunity to advance to further education, employment and independent living as their non-disabled peers. This standard provides the flexibility, but also the accountability, required for school districts to fulfill their obligations under the IDEA. Because Endrew F.'s school did not consider and implement such standards, the Tenth

Circuit below was in error to find that the district complied with the statutory directives, and should be reversed.

ARGUMENT

I. Disparate Educational Opportunity Has a Profound Effect on Children With Disabilities

Nineteen percent of the U.S. population has a disability. U.S. Dep't of Commerce, Econ. & Statistics Admin., Census Bureau, Americans with Disabilities: 2010.[4] The past several decades have seen broad social and legislative recognition of the rights and capabilities of the disabled as equal and valued members of society. This has taken place against a backdrop of tremendous strides in research-based interventions, accommodations and technologies that have markedly enhanced the potential of persons with disabilities for educational achievement, employment and independent living.

These changes have been reflected in legislation and court decisions advancing the rights of individuals with disabilities to ensure their full participation and equality in the fabric of our community. As discussed in this Court's landmark decision in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), segregating persons with disabilities from the community and depriving them of the means to

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[4] Available at: https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html.

overcome this isolation violates their rights and perpetuates unwarranted assumptions that such persons are incapable of or unworthy of participating in community life on equal terms. Such discrimination "severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Id.* at 601.

The right to education—a fundamental predicate to participation in modern society—was part and parcel of the movement to empower and integrate people with disabilities. More than 60 years ago, this Court admonished that "We must consider public education in the light of its full development and its present place in American life throughout the Nation." *Brown v. Bd. Of Ed. Of Topeka*, 347 U.S. 483, 492-93 (1954). "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education . . . a right which must be made available to all on equal terms." *Id.* at 493. These judgments formed the basis for the EHA, since strengthened and extended as the IDEA, with the purpose of meeting the "unique needs" of children with disabilities and preparing them for "further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A) (2012). In huge swaths of the country, however, this has been an empty promise. A number of circuit courts, including the Tenth Circuit, have erroneously concluded that schools must only provide these children an education that is of "merely

more than *de minimis*" benefit. For children with disabilities, this deprivation of educational opportunity truly "affect[s] their hearts and minds in a way unlikely ever to be undone." *Brown*, 347 U.S. at 494.

Every year, approximately 396,000 students with disabilities transition from school to adult life. *See* Nat'l Ctr. for Educ. Statistics, *Children and Youth with Disabilities* (May 2016) (2012-13 school year data).[5] Like Endrew F., 50,000 of these students have autism. Anne M. Roux, et al., *Postsecondary Employment Experiences Among Young Adults With an Autism Spectrum Disorder Rh: Employment in Young Adults with Autism*, 52 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 931 (2013). For children living in jurisdictions following a merely more than *de minimis* standard, that transition is all too frequently to lives of poverty and isolation because their public schools neither provided nor were required to provide an equal educational opportunity to prepare them for further education, employment, and independent living.

The unemployment rate for these children remains far too high and the post-secondary education rate far too low in relation to their abilities. In 2015, only 17.5 percent of the population with disabilities was employed. Bureau of Labor Statistics, *Persons with a Disability: Labor Force Characteristics—2015* (June 21, 2016). Thirty-five

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[5] Available at: http://nces.ed.gov/programs/coe/indicator_cgg.asp

percent of young adults (aged 19-23) with autism have not had a job or received postgraduate education after leaving high school. Paul T. Shattuck, et al., *Postsecondary Education and Employment Among Youth with an Autism Spectrum Disorder*, 129 PEDIATRICS 1042, 1046 (June 2012).

The number of children with autism and other conditions has been growing not shrinking, making it all the more imperative to act. Centers for Disease Control and Prevention ("CDC"), *Prevalence of Autism Spectrum Disorder Among Children Aged 8 Years — Autism and Developmental Disabilities Monitoring Network, 11 Sites,* United States, 2010, 63 MORBIDITY & MORTALITY WKLY. REP. 2, 8 (Mar. 28, 2014) (estimating that the number of American children diagnosed with autism spectrum disorder ["ASD"] increased 123% between 2002 and 2010 and now stands at 1 in 68 children). The percentage of children diagnosed with ADHD increased from 7.8% in 2003 to 11.0% in 2011. Centers for Disease Control and Prevention, *Attention-Deficit/Hyperactivity Disorder (ADHD), Data & Statistics.*[6] And while the number of students identified as learning disabled (a term that encompasses those with dyslexia, dyscalculia, and dysgraphia) has declined since 2002, that population increased over 300% since 1976 to comprise approximately 5% of the nation's current school-age population. Nat'l Ctr. for Learning Disabilities, *The*

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[6] Available at http://www.cdc.gov/ncbddd/adhd/data.html.

State of Learning Disabilities: Facts, Trends and Emerging Issues 12 (Third Edition, 2014).

As the numbers of children identified with disabilities increase, so have economic opportunities for individuals with disabilities who are adequately educated. Data analyzed by a joint initiative of the Department of Labor and the White House Council of Economic Advisors indicates that "[m]ost job growth is in occupations where computer use is important, and the rapid development of new computer and information technologies has particular benefits for many people with disabilities by helping overcome specific physical and cognitive limitations, and significantly increasing the workplace productivity of people with disabilities."[7] U.S. Dep't of Labor, *Economic Picture of the Disability Community Project: Key points on Disability and Occupational Projections Tables* (Oct. 2014) (internal citation omitted). Yet, as the joint initiative concluded: "Whether the potential for increased employment of people with disabilities will be realized depends in part on public and corporate policies regarding access to appropriate education, computer skills, and other training . . . ." *Id.*

Providing an adequate education to prepare children to be able to lead productive lives lies at the heart of the IDEA. A standard that is "reasonably calculated" to provide a merely more than *de minimis*

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[7] Available at https://www.dol.gov/odep/pdf/20141022-KeyPoints.pdf.

educational benefit quickly devolves to a stiflingly low ceiling on children's futures, not a floor of opportunity. As in the present case, some parents unable to get their children appropriate educational supports and services as a result of this low standard must forego a public education entirely and instead home-school or place their children in private school—an outcome that the IDEA was meant to prevent. Others simply cannot afford those options.

Low educational expectations disproportionally affect minority students, who continue to be placed into special education at a far higher rate than non-minority students. U.S. Dep't of Education, Office of Special Educ. Programs, *37th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*, 41, Exh. 25 (Dec. 2015).[8] In addition, minority students have historically faced greater poverty making them more dependent on services from the public schools. For many of these children, there is simply no alternative to the public school and no option for improvement when faced with the barrier of a merely more than *de minimis* standard.[9] And yet these same students are

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[8] Available at http://www2.ed.gov/about/reports/annual/osep/2015/parts-b-c/37th-arc-for-idea.pdf

[9] The consequences to the student and society are grave. In addition to the prospect of unemployment and dependency, studies have shown disproportionate numbers of youth in juvenile justice facilities were students with disabilities. *See e.g.*, National Center on Education, Disability and Juvenile Justice, *Special Education in Correctional Facilities* (May 2000), available at http://www.edjj.org/Publications/pub05_01_00.html. More than one in three children entering correctional facilities

also the most likely to be enrolled in schools with less funding that are less likely to implement the very practices that are known to close the achievement gap.

Graduation rates for African-American students with disabilities are substantially lower than rates for Caucasian or Asian/Pacific Islander students. Rosalie S. Boone & Arlene King-Berry, *African American students with disabilities: beneficiaries of the legacy?*, 76 J. OF NEGRO EDUC. 334-345 (2007). African-American students are more likely to be tracked into segregated special education schools and classrooms. *Id.*; *see also*, U.S. Dep't of Educ., Office of Special Education Programs, *38th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Oct. 2016) 51 (showing Caucasian students are more likely to be in mainstreamed classrooms than African American students). According to one survey, one in every two students identified as learning disabled faced a school disciplinary action such as suspension or expulsion in 2011, with those statistics even less favorable to students identified with emotional disturbances. Nat'l Ctr. for Learning Disabilities at 16. Students of color are disproportionately represented in both categories. For far too many students, the reality of special education is de facto segregation that *Brown* sought to rectify. These

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previously received special education services; children with emotional disturbance and learning disabilities make up 42% and 45%, respectively, of those incarcerated. *Id.*

outcomes are facilitated by the low definition of an appropriate education for students with disabilities permitted by the Tenth Circuit standard.

II. Neither The EHA, Nor The Court In *Rowley*, Established A Merely More Than *De Minimis* Standard for Determining an Appropriate Education for Children with Disabilities

The Tenth Circuit concluded in this case that this Court's decision in *Rowley* dictated that "the educational benefit mandated by IDEA must *merely be more than de minimis.*" *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338 (10th Cir. 2015) (emphasis added). Neither the EHA nor the Court in *Rowley* adopted such a meager standard. Indeed, the terms "trivial" and "*de minimis*" do not appear anywhere in the EHA or in *Rowley*.

The 1982 decision in *Rowley* construed the relatively new EHA of 1975 at a time when many children with disabilities were excluded from any opportunity to learn. Looking to the EHA's legislative history and purpose, the *Rowley* Court saw Congress's primary focus in the EHA as providing educational access to those children. *Rowley*, 458 U.S. at 192 ("[T]he intent of the Act was more to open the door of public education to handicapped children . . . ."). Even then, however, Congress clearly contemplated a higher degree of educational benefit than one that is merely more than *de minimis*. As set forth in its legislative findings and purposes, the Act was "to establish a

policy of providing full educational opportunities for all handicapped children." S. Rep. No. 94-168 (1975). "[T]he quality of education for all children [must] attain[] a level commensurate with the demands of life in our complex society and offer[] the opportunity for the fulfillment of the potential abilities of all children, especially our handicapped children." 121 Cong. Rec. 37412 (Nov. 19, 1975) (statement of Sen. Taft). Congress recognized that not only had 1.75 million children been totally excluded from schools but 2.5 million children with disabilities who were in school still did not receive "an adequate education." 121 Cong. Rec. 37030 (Nov. 18, 1975) (statement of Dominick V. Daniels); 121 Cong. Rec. 37025 (Nov. 18, 1975) (statement of Mr. Brademas).

In keeping with the individualized focus of special education in the EHA, *Rowley* must be viewed in light of the facts before the Court. The Court did not purport to determine a one-size-fits-all test for an appropriate education, much less that providing a merely more than *de minimis* educational benefit would meet that test. Instead, it concluded that Amy Rowley's education was appropriate because she was receiving an "adequate" education due to – importantly – her passing grades and high performance in relation to general standards for children *without* disabilities, and she was receiving specialized education and related services to meet her educational needs. *Id.* at 210. Although her story may parallel some, Amy Rowley's situation was and remains vastly different from that of millions of other children receiving services under the current IDEA.

The world has changed since *Rowley*. In 1982, special education had received little attention. Methods for identifying children with disabilities were still developing. Indeed, the two primary disabilities of Endrew F. – autism and ADHD, disabilities that are now commonplace – were not even recognized disabilities within the statutory regime and would not be so for many years.[10] The Court in *Rowley* also did not have the benefit of the over thirty years of research, experiential learning, outcome analysis, and best practices, set forth *infra* at Point IV and which informed current statutory requirements.

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[10] Congress added the definition of autism to the list of disabilities in the Act in 1990, nearly ten years after the *Rowley* decision. 20 U.S.C. § 1401. ADHD was added to the regulatory definition of other health impairment after the 1997 amendments to the IDEA. 34 C.F.R. 300.8(c)(9). The estimated prevalence of autism in the 1960s and 1970s was only four to five cases per 10,000 children, as opposed to current estimates of 1 in 68 children. CDC, *Prevalence of Autism* at 8. As of 2011, some 6.4 million children, or one in five children, are identified as having ADHD. Centers for Disease Control and Prevention, *Attention-Deficit/Hyperactivity Disorder*. The understanding of other disabilities has similarly evolved. The classic text on dyslexia, by Sally Shaywitz, *Overcoming Dyslexia: A New and Complete Science-Based Program for Reading Problems at Any Level*, was not published until 2003. At that time, over twenty years after the *Rowley* decision, research was finally available to establish identification as early as age 4. *See id.* at 99.

III. Congressional Legislation Since Rowley Requires High Educational Standards for Students With Disabilities

The years after *Rowley* saw a broad movement in education policy. Focus shifted from mere access to education to an emphasis on improved educational outcomes for all students, including students with disabilities.

A. The 1994 Goals 2000: Educate America Act Set High, Measureable Academic Goals for All Students, Including Students With Disabilities

Congress moved away from access-based education and towards outcome-based education in 1994 with the enactment of the Goals 2000: Educate America Act, 20 U.S.C. 5801 *et seq.* The Act established a framework for meeting national education goals by "establishing valid and reliable mechanisms for . . . assisting in the development and certification of high-quality assessment measures that reflect the internationally competitive content and student performance standards." 20 U.S.C. § 5801(4). Among the goals was to "promot[e] the social, emotional and academic growth of children," including "children with disabilities." *Id.* §§ 5812(8)(A), (B)(i).

B. The 1997 Amendments to IDEA Emphasized a High-Expectation, Outcome-Based Education for Children with Disabilities

An increased emphasis on educational quality and outcomes was a central feature of the 1997 amendments to the IDEA ("IDEA 1997"). Congress recognized that low expectations for students with disabilities had impeded implementation of the Act. As stressed in the Senate Committee Report:

> This committee believes that the critical issue now is to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education. Educational achievement for children with disabilities, while improving, is still less than satisfactory. This review and authorization of the IDEA is needed to move to the next step of providing special education and related services to children with disabilities: to improve and increase their educational achievement.

S. Rep. No. 105-17, at 3 (1997).

IDEA 1997 emphasized high expectations to insure participation in the general curriculum to the maximum extent possible. Congress also updated the nature and goals of an appropriate education under the IDEA requiring the design of IEPs to meet

children with disabilities' "unique needs" and prepare them for "employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). Congress also recognized the potential of assistive technologies "to maximize accessibility [to the classroom] for children with disabilities." *Id.* at (c)(5)(H); *see also* § 1414(d)(3)(B)(v).

The overall intent was to "review, strengthen, and improve IDEA to better educate children with disabilities and enable them to achieve a quality education." *Id.* at 5. The legislation contemplated using improved tools and increased standards to heighten academic achievement. The legislation was to "encourage exemplary practices that lead to improved teaching and learning experiences for children with disabilities, and that in turn, for these children, result in productive independent adult lives, including employment." *Id.*

IDEA 1997 consolidated and strengthened IEP provisions as the primary vehicle for insuring educational benefits preparing a child for a productive adult life. 34 C.F.R. § 300.347(b)(1)(i); *see also* H.R. Rep. No. 105-95 (1997) ("The purpose of [this provision] is to focus attention on how the child's educational program can be planned to help the child make a successful transition to his or her goals for life after secondary school."). The amendments were intended to improve the "educational results for children with disabilities [as] an essential element of our national policy of ensuring equality of opportunity, full participation,

independent living and economic self-sufficiency for individuals with disabilities." *Id.* at 2-3.

The House Committee report similarly emphasized that: "The challenge today is not so much how to provide access to special education services but how to appropriately provide educational services to children with disabilities in order to improve educational results for such children." H.R. Rep 105-95. The Committee saw the requirement for a child's IEP to include measureable goals, benchmarks, and objectives as "critical." *Id.* at 100. The goals should be directed to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general educational curriculum." *Id.* The Committee also recognized the importance of integrating research knowledge and practice to improve outcomes and emphasized that the "Committee believes strongly that an organized collective commitment to get validated research – best practice information – to the teacher in the classroom is essential." *Id.* at 118.

As summed up by the President at the signing ceremony for IDEA 1997: "[T]he legislation mandates that with appropriate accommodations children with disabilities learn the same things with the same curricula and the same assessments as all other children . . . . [C]hildren rise to expectations when they are set high. And children with disabilities are no exception." Remarks of Pres. William J. Clinton at the Signing Ceremony for the Individuals with Disabilities Education Act (June 4, 1997).

C. With the No Child Left Behind Act of 2001, Congress Established Higher Educational Standards for All Children, Including Children with Disabilities

As part of this broader movement to improve educational outcomes and standards for all students, Congress enacted the No Child Left Behind Act ("NCLB") in 2001. This was an update to the Elementary and Secondary Education Act of 1965. Notwithstanding the significant diversity in learning cultures, social and economic challenges, income and other factors of children in the nation's public schools, Congress, through NCLB, required that "all children" are to obtain "a high-quality education" so that they can "at a minimum, [achieve] proficiency on challenging State academic achievement standards and state academic assessments." 20 U.S.C. § 6301. The "high quality education" standard expressly applied to children with disabilities. *Id.* § 6301(2).

D. The 2004 IDEA Amendments Heightened Outcomes, Requirements and Accountability

In 2004 Congress further amended the IDEA ("IDEA 2004"), strengthening provisions for research-based interventions and technologies designed to ensure that children with disabilities receive a high quality education commensurate with their non-disabled peers and to effectively prepare them to lead independent and productive lives. The amendments were a direct response to Congress's conclusion that

"the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." 20 U.S.C. § 1400(c)(4). IDEA 2004 spells out the promise of that research:

> Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—
>
> (A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to—
>
> > (i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and
> >
> > (ii) be prepared to lead productive and independent adult lives, to the maximum extent possible.

20 U.S.C. § 1400(c)(5). Congress designed IDEA 2004 to fulfill that promise by "ensur[ing] that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further

education, employment, and independent living." 20 U.S.C. § 1400 (d)(1)(A).

The addition of preparation for "further education" was new. As explained in the House Report: "By modifying the purpose to reflect the importance of further education, the Committee intends to send the message that children with disabilities have a broad array of opportunities available to them when they complete their secondary education and that children with disabilities can continue on to post-secondary education or to competitive employment or independent living." H.R. Rep. 108-77 at 46.

Moving beyond IDEA 1997's mandate that children with disabilities should have *access* to the general curriculum "to the maximum extent possible," the IDEA 2004 mandate was to improve their actual "academic achievement and functional performance" to the "maximum extent possible." 20 U.S.C. § 1400(c)(5)(E). The Senate Committee explained:

> Nearly 30 years ago, the Education for All Handicapped Children's Act was enacted to provide keys to the schoolhouse door for children with disabilities. Previously, many of these children did not have the opportunity to receive a public education in America's classrooms. Today the school house door is open. The committee's focus during

> this reauthorization is on the quality of education children are receiving under the law. The committee has sought to ensure that the framework of IDEA helps to produce improved educational results for children with disabilities.

S. Rep. No. 108-185, at 6.

As part of its heightened emphasis on performance, Congress stated that it was "crucial" to "concentrate on improving educational outcomes for children by focusing on accountability for results." *Id.* at 3. A key mechanism for this was the alignment of assessments used for children with disabilities with state academic content and achievement standards applicable to all students. The Senate Committee viewed this as a "necessary component to ensuring accountability for the performance of all children with disabilities, including children with significant disabilities." *Id.* at 56. The Committee also concluded that "an increased focus on improved results in education, providing a successful transition to post-school employment or education is an essential measure of accountability for students with disabilities." *Id.* at 60; *see also id.* at 96 (stating that the 2004 amendments align IDEA with the accountability systems of NCLB because they "established a rigorous accountability system for States and local educational agencies to ensure that all children, including children with disabilities, are held to high academic achievement standards . . .").

In recognition of the significant advances in research-based interventions and proven technologies available to meet increasingly rigorous outcome-oriented standards, Congress fortified the IDEA with provisions for technology, peer reviewed research, transition planning and services,[11] and behavioral interventions to prepare students for that further education, employment and independent living. 20 U.S.C. § 1400(c)(4)-(5); *see also* S. Rep. No. 108-185, at 27 (2003) (emphasizing the importance of sound research-based methodologies).

As part of this shift from mere access to "academic achievement and functional performance," the requirement for benchmarks and short-term objectives in IEPs was to be phased out after the 2005-06 school year for a large majority of children with disabilities. As explained by the Senate Committee:

> Special education practice via short-term objectives too often focuses on achieving only small incremental improvements in student performance to the detriment of more effective longer range planning. Short-term objectives and benchmarks can focus too much on minor details and detract from the real purpose of special education which is to

[11] Congress also amended the definition of "transition services" to "emphasize a focus on improving academic and functional achievement of a child with disability." S. Rep. No. 108-185, at 9.

> ensure that all children and youth with disabilities achieve high educational outcomes and are prepared to participate fully in the social and economic fabric of their communities.

S. Rep. No. 108-185, at 28; *see also* H.R. Rep. 108-77 at 109.

E. New IEP Requirements Expanded the Definition of Appropriate Education

The IEP is "the centerpiece of the statute's education delivery system," *Honig v. Doe*, 484 U.S. 305, 311 (1988), and a primary component of the appropriate education required by the Act. *Rowley*, 458 U.S. at 181, 203. The definition of "free appropriate public education" explicitly requires it to be "provided in conformity with the individualized education program" requirements of the Act. 20 U.S.C. § 1401(9)(D). The IDEA in its current form contains detailed requirements for IEPs that would make little sense if all that was required was an IEP reasonably calculated to deliver a merely more than *de minimis* educational benefit. The IEP must be carefully tailored to the particular needs and abilities of each child, *see* 20 U.S.C. § 1414(d)(1)(A)(i)(I), as determined by use of a variety of technically sound instruments used to assess relevant functional, developmental and academic information about the child. 20 U.S.C. § 1414(b)(2)(a)(ii), (c). The IEP requires a clear statement of "measurable annual goals" in light of those needs and abilities. 20 U.S.C.

§ 1414(d)(1)(A)(i)(II). Section 1414(d) also requires special education and related services to enable each child "to advance appropriately toward attaining the annual goals" and "to be involved in and make progress in the general education curriculum." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). Special education and related services and supplementary aids and services are now required to be "based on peer-reviewed research to the extent practicable." *Id.* at § (d)(1)(IV). For children sixteen and over, the IEP must include transition planning including measurable goals based on appropriate assessments and services needed to assist in reaching those goals. 20 U.S.C. § 1414(d)(1)(VIII)(aa), (bb).

The IEP is to be developed based on the academic, developmental and functional needs of the child. 20 U.S.C. § 1414(d)(3)(A)(iv). When children have behavioral issues that "impede" learning, the IEP team must consider positive behavioral interventions, supports and strategies to address this. 20 U.S.C. § 1414(d)(3)(B)(i). The IEP team must also consider the "communication needs" of the child and also "whether the child needs assistive technology devices and services." 20 U.S.C. § 1414(d)(3)(B)(iv), (v). The IEP team is required to revise the IEP as appropriate to address "*any* lack of progress toward the annual goals and in the general education curriculum, where appropriate." 20 U.S.C. § 1414(d)(4)(A)(i), (ii)(I) (emphasis added).

Current guidance from the U.S. Department of Education further underscores that the Act's

provisions call for robust standards and not a merely more than *de minimis* educational benefit. *See*, U.S. Dep't of Educ., Dear Colleague Letter: Clarification of FAPE and Alignment with State Academic Standards 1 (Nov. 16, 2015) (children with disabilities should be given "rigorous academic standards," emphasizing the importance of having "high expectations" for them in 2015).

In addition, under the recently enacted Every Student Succeeds Act ("ESSA") amending the ESEA, alternate academic achievement standards for students with the most significant cognitive disabilities must "reflect professional judgment as to the highest possible standards achievable by such students" and be "aligned to ensure that a student who meets the alternate academic achievement standards is on track to pursue post-secondary education or employment consistent with the purposes of [the Rehabilitation Act]." 20 U.S.C, § 6311(b)(1)(E)(iii), (i)(V).

* * *

A merely more than *de minimis* educational benefit standard cannot fulfill the intended functions and requirements of the amended statute. It renders superfluous, and defeats enforcement of, requirements for accountability, individualized programming using valid tools based on peer reviewed research, meaningful consideration of needed behavioral interventions and assistive technologies, and requirements for meeting state

standards. An IEP calculated to deliver a merely more than *de minimis* level of educational benefit reflects the watered-down expectations, and lack of accountability that Congress consistently rejected and prevents the achievement of independent living, employment and full participation in society for students with disabilities.

IV. Advances in Educational Practices and Technologies Markedly Improve Educational Outcomes for Students with Disabilities and Have Done So In Many Districts

The advances in peer-reviewed evidence-based instruction practices, assistive technologies and behavioral interventions that served as an impetus for Congressional revisions to the IDEA have continued to mount, dramatically increasing the potential for children with disabilities to achieve significant learning.

The science of Applied Behavior Analysis ("ABA")[12] provides effective methods to teach children with autism to communicate, do academic work, build functional skills, reduce behaviors that impede learning and increase socialization in ways critical for independence and further education and

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[12] Applied Behavior Analysis is the process of systematically applying interventions based upon the principles of learning theory to improve socially significant behaviors to a meaningful degree. *See* Donald M. Baer, Montrose M. Wolf & Todd R. Risley, *Some Still-Current Dimensions of Applied Behavior Analysis*, 20 J. OF APPLIED BEHAVIOR ANALYSIS 313 (1987).

employment. *See, e.g.*, CDC, *Autism Spectrum Disorder (ASD) Treatment* ("ABA has become widely accepted");[13] Scott M. Myers, Chris Plauche Johnson, the Council on Children with Disabilities, *Management of Children with Autism Spectrum Disorders*, 120 PEDIATR. 1164 (2007) ("The effectiveness of ABA-based intervention in ASD has been well-documented.").[14]

A comprehensive 2013 report funded by the U.S. Department of Education and the Institute of Education Science identified a number of evidence-based practices ("EBPs") for children with autism, involving ABA techniques, that are effective across multiple developmental and skill areas. *See* Connie Wong, et al., Univ. of N.C., *Evidence-based practices for children, youth, and young adults with autism spectrum disorder* 22 (2014).[15] The report stressed

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[13] Available at http://www.cdc.gov/ncbddd/autism/treatment.html (last updated Feb. 24, 2015).

[14] The use and development of ABA gained increasing prevalence after a landmark research study showing 90% of subject children with autism substantially improved when utilizing ABA, compared to the control group, and close to half attained a normal IQ and tested within the normal range on adaptive and social skills. Ole Ivar Lovaas, *Behavioral treatment and normal educational and intellectual functioning in young autistic children*, 55 J. CONSULTING & CLINICAL PSYCHOLOGY 1, 6 (1987). A 1993 study showed that these same children had maintained their skills into early adolescence and could succeed in life without costly special education and residential services. John Jay McEachin, et al., *Long-term outcome for children with autism who received early intensive behavioral treatment*, 97 AM. J. MENTAL RETARDATION 4 (1993).

[15] Available at http://fpg.unc.edu/sites/fpg.unc.edu/files/

the importance of linking EBPs with student goals and the "great responsibility of the practitioner to implement the EBP with fidelity." *Id.* at 33.[16]

A key feature of ABA is that it can allow students to acquire skills at a faster rate which is essential if they are to "close the gap"[17] with constantly developing typical children. *See* Lars Klintwall, et al., *Narrowing the Gap: Effects of Intervention on Developmental Trajectories in Autism*, 19 AUTISM 1, 53-63 (2015); *see also* Jane S. Howard, et al., *A comparison of intensive behavior analytic and eclectic treatments for young children with autism*, 26 RES. IN DEVELOPMENTAL DISABILITIES 359, 376 (2005).

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resources/reports-and-policy-briefs/2014-EBP-Report.pdf

[16] By contrast, research indicates that general eclectic programs (which tend to be used by a number of school districts) are significantly less effective than intensive research-based ABA programs implemented with fidelity. *See* Jane S. Howard, et al., *Comparison of behavior analytic and eclectic early interventions for young children with autism after three years*, 35 RES. IN DEVELOPMENTAL DISABILITIES 3326–3344 (2014) ("children who received [intensive behavior analytic intervention] were more than twice as likely to score in the normal range on measures of cognitive, language and adaptive functioning than were children who received either form of eclectic intervention."); Sigmund Eldevik, et al., *Using participant data to extend the evidence base for intensive behavioral intervention for children with autism*, AM. J. ON INTELL. & DEVELOPMENTAL DISABILITIES 381 (2010).

[17] Cf. Dear Colleague letter dated November 16, 2015 at 5 ("IEP goals should be sufficiently ambitious to help close the gap.").

As in this case, behavioral issues stemming from a child's disability can have wide and long-lasting consequences preventing learning and socialization. In addition to skill building and communication, ABA interventions have been effective to reduce behavior such as aggression, self-injurious behavior and impaired social interaction that can prevent education and functioning.[18]

ABA-based instruction is also effective for transitioning children with autism to adult life, allowing them to develop foundational and job specific skills for employment, functional independent living skills, and social and community interaction skills. *See* Jonathan W. Ivy & Kimberly A. Schreck, *The efficacy of ABA for individuals with autism across the lifespan*, CURR. DEV. DISORD. REP. 57, 62-63 (2016); Carol Schall, et al., *Transition from school to work for students with autism spectrum disorders: understanding the process and achieving*

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[18] Mieke Heyvaert, et al., *A multilevel meta-analysis of single-case and small-n research on interventions for reducing challenging behavior in persons with intellectual disabilities*, RES. DEVELOPMENTAL DISABILITIES 766 (2012); Brian Reichow & Fred Volkmar, *Social skills interventions for individuals with autism: evaluation for evidence-based practices within a best evidence synthesis framework*, J. AUTISM DEV. DISORD. 2010. Addressing social impairments is particularly important for students with Aspergers or high functioning autism who may be successful academically but have significant impairments that impede them functionally. *See* Kelly May, *Teaching Strategies for Asperger Students*, Johns Hopkins School of Education, available at http://www.education.jhu.edu/PD/newhorizons/Exceptional%20Learners/Autism/Articles/Teaching%20Strategies%20for%20Asperger%20Students/

better outcomes, PEDIATR. CLIN. N. AM. (2012); Jennifer Ninci, et al., *Meta-analysis of single-case research on teaching functional living skills to individuals with ASD*, REV. J. AUTISM DEV. DISORD. (2015).

Peer-reviewed research also demonstrates the effectiveness of evidence-based educational and supportive interventions for children with learning disabilities, including the eighty percent that have dyslexia. Children whose dyslexia is not addressed face tremendous difficulties in adulthood. Yet effective interventions are available. Peer-reviewed research about the hallmarks of strong reading programs for children with dyslexia gained prominence after the National Reading Panel released its findings in April of 2000. *See* Nat'l Reading Panel, *Teaching children to read: an evidence-based assessment of the scientific research literature on reading and its implications for reading instruction* (Apr. 2000) (also describing advances for ADHD programs).[19] Experts on the Reading Panel identified key features necessary for reading programs to be effective, including phonemic awareness, phonics taught systematically and explicitly, spelling, sight words, and others. *Id.*, Findings and determinations. *See also*, Sally Shaywitz, *Overcoming Dyslexia – A New and Complete Science-Based Program for Reading Problems at Any Level* 208-10 (1st Ed. 2003).

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[19] Available at https://www.nichd.nih.gov/publications/pubs/nrp/pages/smallbook.aspx

As noted expert Dr. Joseph Torgeson concluded a decade ago, "we now have considerable evidence available concerning the effectiveness of intensive and explicit reading interventions for children who have struggled in learning to read." Joseph Torgesen, *Recent discoveries from research on remedial interventions for children with dyslexia, in* The Science of Reading: A Handbook 537 (M. Snowling & C. Hulme, 2008).

Another significant tool for educators is Universal Design for Learning ("UDL"). UDL is a set of principles to help schools design curricula that serve all learners, regardless of ability, age, gender, disability, or cultural or linguistic background, in order to give all students equal opportunity to learn. UDL provides a scientifically valid framework for educational practice surrounding curricular goals, instructional materials, assessments, and teaching methods in a way that ensures the widest range of learners is receiving the supports they need. UDL was incorporated in the Higher Education Act of 2008 (Public Law 110-315) ("HEOA") at 20 U.S.C. § 1003.24.[20] UDL principles were also expressly incorporated throughout ESSA (*supra* at 27). *See* Pub. L. No. 114-95, 129 Stat. 1802 (2015) §§ 1005, 1204, 2221(b)(1), and 4104. UDL is a tool that

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[20] The 2010 National Education Technology Plan that was released by the U.S. Department of Education also incorporates UDL throughout to ensure that technology is optimized to benefit diverse learners, including those with disabilities. U.S. Dep't of Educ., Office of Educ. Tech., *Transforming American Education, Learning Powered by Technology* 1, 14-18 (2010).

applies to all learners and, as such, it provides a bridge between special education and the mainstream classroom.

Another example of evolved educational practices that benefit a wide swath of students with disabilities, including those with Down Syndrome, is inclusive education. Forty years of research demonstrates the correlation between time in the general education classroom and academic and social progress. Meghan Cosier, et al., *Does access matter? Time in general education and achievement for students with disabilities*, 34 REMEDIAL & SPECIAL EDUC. 323-332 (2013); Michael Guralnick, et al., *The peer relations of preschool children with communication disorders*, 67 CHILD DEV. 471-89 (1996); Kurth, et al., *Academic and Cognitive Profiles of Students with Autism: Implications for Classroom Practice and Placement*, 25 INT'L J. OF SPECIAL EDUC. 2, 8—14 (2010) (finding junior high-school students with autism in self-contained classrooms had similar scores on cognitive and adaptive functioning tests as children with autism in general education classrooms, but the latter scored significantly higher in achievement tests).[21]

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[21] Indeed, studies show that inclusive classrooms lead to improved academic and decision-making skills for the entire classroom, and not just the subset of students identified as having disabilities. *See, e.g.*, Jeong Hoon Choi, et al., *Improving learning for all students through equity-based inclusive reform practices: effectiveness of a fully integrated schoolwide model on student reading and math achievement*, REMEDIAL & SPECIAL EDUC. 1-14 (2016); Xin Zhang, et al., *Improving children's*

Advancements in technology have game-changing benefits for a wide range of children with disabilities, including those with autism and cerebral palsy, when combined with evidence-based practices. For example, "integrating multimedia computer supports with activity schedules can be an effective way to teach students to manage their work, play, and skill-building activities independently." Robert Stromer, et al., *Activity schedules, computer technology, and teaching children with autism spectrum disorders*, 21 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES 14-24 (2006). Further, Ipads and other:

> [m]obile technology can be used effectively . . . not only . . . as . . . [Assistive or Augmented Communication] devices, but to also assist in teaching academic areas, social skills, video modeling, reinforcement, ABA, speech/language therapy, fine motor skills, visual supports, functional life skills, organizational skills, and increasing independence.

Kristie Brown Lofland, *The Use of Technology in Treatment of Autism Spectrum Disorders*, Indiana Resource Center for Autism, Indiana University.[22]

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competence as decision makers: contrasting effects of collaborative interaction and direct instruction, 53 AM. EDUC. RES. J. 194-223 (2016).

[22] Available at https://www.iidc.indiana.edu/pages/the-use-of-technology-in-treatment-of-autism-spectrum-disorders.

For children with physical disabilities, "technology can give access to learning opportunities previously closed to them. E-readers help students turn book pages without applying dexterity, and voice adaptive software can help students answer questions without needing to write." Kris Zorigian & Jennifer Job, *How do special education students benefit from technology?*, LEARN NC, UNC-CHAPEL HILL SCHOOL OF EDUCATION (2010).[23] Other technologies include "alphabet eye gaze frames allowing children to 'point' to letters with their eyes, onscreen keyboards that are controlled by switches, and electronic flipcharts." *Id.* For students with print disabilities, including those with dyslexia and visual impairments, screen reader software can read aloud information from e-books and web-pages. Refreshable braille peripheral devices can actively translate that information into braille. Assistive Training Online Project, Sch. of Pub. Health and Health Professions, SUNY-Buffalo, *Reading & Computing*.[24]

It should also be noted that a number of resources are available to assist schools implementing these interventions, which are being employed in many schools across the country. *See, e.g.*, It's Time for School: Building Quality ABA Educational Programs for Students with Autism Spectrum Disorders, by Ronald Leaf, Mitchell Taubman & John McEachin; U.S. Dep't of Educ.,

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[23] Available at http://www.learnnc.org/lp/pages/6917?ref=search.

[24] Available at http://atto.buffalo.edu/.

Dear Colleague Letter: 68 IDELR 176 (OSEP/OSERS) (Aug. 1, 2016) (discussing changes and improvements to IEPs as needed to address behavioral issues.); Levine, P., Marder, C., & Wagner, M. (2004), *Services and Supports for Secondary School Students with Disabilities: A Special Topic Report from the National Longitudinal Transition Study-2 (NLTS2).* Menlo Park, CA: SRI International.[25]

Schools in circuits rejecting a merely more than *de minimis* educational standard in favor of a robust standard have implemented substantial evidence-based programs, and have successfully defended them from due process challenges seeking additional benefits. *See R.K. & D.K. v. Clifton Board of Education*, 587 F. App'x 17, 17 (3d Cir. 2014) (holding that school's ABA program provided a free appropriate public education ["FAPE"] and rejecting plaintiffs' request for services delivered by a different ABA provider); *M.A. v. Jersey City Bd. of Educ.*, 592 F. App'x 124, 124 (3d Cir. 2014) (finding that school district's proposed placement from a department of education approved private ABA school to a district school's less intensive ABA program based on skills student had developed for learning in more natural settings did not deny student a FAPE); *Ridley School Dist. v. M.R.*, 680 F.3d 260, 275 (3d Cir. 2012) (holding school provided a FAPE where "the peer reviewed specially designed reading instruction in E.R.'s IEP was 'reasonably calculated to enable [her]

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[25] Available at http://www.nlts2.org/reports/2004_05/index.html.

to receive meaningful educational benefits in light of [her] intellectual potential'") (quoting *Chambers v. Sch. Dist. of Phila. Board of Education*, 587 F.3d 176 (3d Cir. 2009)).

V. An Appropriate Education Under the IDEA Requires Measureable Goals Designed in Accordance with Peer-Reviewed Research To Provide Children With Disabilities With Educational Opportunities Substantially Equal to Their Non-Disabled Peers

The Tenth Circuit standard that "merely more than trivial" educational progress satisfies the IDEA requirement for a "free appropriate public education" is erroneous and should be rejected. It is important, however, for strong and consistent enforcement of the Act, that the Court now clarify how educators and lower courts should make that determination.

The purposes and requirements of the IDEA as amended provide a solid model for the answer. First, what is appropriate must be determined in light of the needs and potential of the particular student, determined in light of current peer-reviewed research and technologies. Second, Congress has clarified that the services for these students are to be judged in relation to whether they are "designed to meet their unique needs *and prepare them for further education, employment, and independent living.*" 20 U.S.C. § 1400(d)(1)(A) (emphasis added). Third, progress is determined with reference to the same standards as non-disabled children.

Taken as a whole, the appropriate standard for a free and appropriate public education is one that provides individualized special education and related services in accordance with the provisions of the Act to afford children with disabilities with substantially equal opportunities as non-disabled students to advance to further education, employment and independent living.

Because the legislative branch directed that an appropriate education be one which is provided "in conformity with" the requirements of the fortified IEP standards adopted by the 1997 and 2004 amendments, any evaluation of a child's educational services must include a determination of whether the child's IEP properly reflects those strengthened IEP directives. *See, e.g., Anchorage S.D. v. D.K.*, 4 IDELR 28 (D. Alaska, 2009) (goals insufficient to constitute FAPE). Any IEP goals that do not reflect the peer-reviewed research mandated by 20 U.S.C. § 1414(d)(1)(IV) cannot meet the definition of FAPE that the services be "in conformity" with 20 U.S.C. § 1414(d). As noted in the preceding section of this brief, there is significant research about the progress children can actually make, including those considered highly disabled, with the appropriate types of interventions and technological supports. Where, as here, a school has neither set measureable goals consistent with the child's abilities, nor considered and implemented programs shown to be effective by peer-reviewed research for the type disability of the child, those special education

services cannot constitute a "free appropriate public education."

CONCLUSION

The world, taking the IDEA with it, has moved beyond low expectations of just providing a desk and a teacher, to demanding high expectations for all students – including those with disabilities. For the foregoing reasons, *amici curiae* respectfully request that this Court reverse the decision below.

Respectfully submitted,

MICHAEL CHURCHILL
LEE AWBREY
PUBLIC INTEREST LAW CENTER
1709 Benjamin Franklin Pkwy
Philadelphia, PA 19103
215-627-7100
mchurchill@pubintlaw.org

GREGORY J. WALLANCE
Counsel of Record
W. STEWART WALLACE
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000
gregory.wallance@
kayescholer.com

DANIEL UNUMB
AUTISM LEGAL RESOURCE
CENTER LLC
125 Ashworth Drive
Lexington, SC 29072
803-608-1160
danunumb.alrc@gmail.com

GARY S. MAYERSON
MARIA C. MCGINLEY
MAYERSON & ASSOCIATES
330 West 38th Street,
Suite 600
New York, NY 10018
212-265-7200
gary@mayerslaw.com

Counsel for Amici Curiae

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APPENDIX

Statements of Interest

Autism Speaks is the world's leading autism science and advocacy organization dedicated to increasing awareness and education about autism, funding research regarding its causes, prevention, and effective treatments, and enforcing state and federal rights and protections for individuals with autism and advocating for the needs of individuals with autism and their families. Each year, 50,000 individuals with autism in the United States will transition to adulthood. Autism Speaks is deeply familiar with the special education challenges faced by children with autism and their families, and the special teaching approaches proven effective to enable children with autism to learn skills across a variety of settings so that they may have the opportunity to lead functional, independent lives as the ultimate outcome of their educational experience.

The National Down Syndrome Society (NDSS) is the leading human rights organization for people with Down syndrome, advocating for the value, acceptance and inclusion of all people with Down syndrome and their families. Since 1979, NDSS has actively advocated for policies and programs to promote inclusive opportunities for students with Down syndrome and access to the general education curriculum, while seeking to ensure that standards and accountability remain high. NDSS has played a key role in supporting the development of postsecondary education options for individuals with developmental disabilities and in promoting

Universal Design for Learning in all classroom settings. NDSS recognizes that individuals with Down syndrome are lifelong learners who learn and develop at their own rate and in their own way, but that Down syndrome is not a blueprint for potential or a prescription for a given educational or life plan. People with Down syndrome have varied goals for their futures and individual expectations of their roles in the family, school and community.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs is a non-profit civil rights organization established to eradicate discrimination and poverty by enforcing civil rights laws through litigation. In furtherance of this mission, the Washington Lawyers' Committee's public education project works to ensure a free and high quality of education for all children, and its disability rights project strives to guarantee equal access to all aspects of society to persons within the disability community. Through these two projects, the Washington Lawyers' Committee has amassed expertise in issues arising under the nation's education and disability laws, including the Individuals with Disabilities Education Act.

Decoding Dyslexia is a network of parent-led grassroots groups in 50 states concerned with the limited access to educational interventions for dyslexia within the public education system. The groups aim to raise dyslexia awareness, empower families to support their children and inform policy-makers on best practices to identify, remediate and

support students with dyslexia. The following 18 Decoding Dyslexia chapters are *amici* on this brief: Arizona, California, Connecticut, Georgia, Illinois, Indiana, Maryland, Massachusetts, Michigan, Montana, New Jersey, New Mexico, New Hampshire, Ohio, North Carolina, Oklahoma, Pennsylvania, and Utah.

TASH is a national organization founded in 1975 advocating for human rights and inclusion for people with significant disabilities and support needs. TASH works to advance inclusive education practices through advocacy, research, professional development, policy, and information and resources for parents, families and self-advocates. The inclusive practices TASH validates through research have been shown to improve outcomes for all people. Because of its activities TASH has significant knowledge about what works in public schools for persons with disabilities.

The International Dyslexia Association (IDA) is a 501(c)(3) nonprofit, scientific, and educational organization dedicated to the study and treatment of the specific language disability know as dyslexia. IDA is the authoritative voice of current and reliable research and information to educate families and professionals about dyslexia and to inform the practice and policy changes needed to provide effective instruction for all people to learn to read. IDA has been serving individuals with dyslexia, their families, and professionals in the field for sixty-five years. IDA's membership is composed of a global

network of people with dyslexia, their families, educators, diagnosticians, physicians, researchers, and other professionals in the field.

United Cerebral Palsy (UCP) educates, advocates and provides support services through an affiliate network to ensure a life without limits for people with a spectrum of disabilities. Together with nearly 70 affiliates, UCP has a mission to advance the independence, productivity and full citizenship of people with disabilities by supporting more than 176,000 children and adults every day. And, more than 15 UCP affiliates specifically provide after school enrichment programs in cooperation with school districts across the US.

Public Counsel is the largest pro bono law office in the nation. Public Counsel provides legal representation, advocacy, and social work support to hundreds of low-income children and families every year, specializing in complex cases involving multiple legal issues. Public Counsel ensures that youth with disabilities have access to a free and appropriate public education under the IDEA through court- and community-based legal clinics, direct representation, policy advocacy, and impact litigation.

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Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF FORMER OFFICIALS OF THE U.S. DEPARTMENT OF EDUCATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

IRA A. BURNIM
LEWIS BOSSING
THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW
1101 15th Street, N.W.
Suite 1212
Washington, D.C. 20005
(202) 476-5730

AARON M. PANNER
Counsel of Record
JOSHUA HAFENBRACK
FREDERICK GASTON HALL
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(apanner@khhte.com)

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INTEREST OF *AMICI CURIAE*[1]

Amici are former U.S. Department of Education officials responsible for special education policy.

Amicus Dr. Thomas Hehir is the Silvana and Christopher Pascucci Professor of Practice in Learning Differences at the Harvard Graduate School of Education. Dr. Hehir served as the Director of the Office of Special Education Programs under President William J. Clinton and has extensive experience implementing school district-level special education plans with the Chicago and Boston public school systems.

Amicus Stephanie Smith Lee served as the Director of the Office of Special Education Programs under President George W. Bush from 2002 to 2005. She has more than 35 years of experience in disability, education, and employment policy, including serving in senior legislative staff positions for Members of the U.S. House of Representatives and the U.S. Senate and for the U.S. Senate Health, Education, Labor, and Pensions Committee. She has served as a Senate Republican Majority Leader appointee to the Ticket to Work and Work Incentives Advisory Panel, as a member of former Virginia Governor George Allen's Champion Schools Commission, and on other commissions. Since her daughter, Laura, was born with Down syndrome in 1982, Ms. Lee has organized and led many successful bipartisan, collaborative

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief by submitting to the Clerk letters granting blanket consent to the filing of *amicus* briefs.

efforts to improve special education and disability policy in Virginia and at the national level. She is currently the Postsecondary Education Consultant to the National Down Syndrome Congress and Chair of the National Coordinating Center Accreditation Workgroup, which is developing model accreditation program standards for higher education programs for students with intellectual disabilities.

Amicus Dr. Melody B. Musgrove is Co-Director of the Graduate Center for the Study of Early Learning and Associate Professor of Special Education at the University of Mississippi. Dr. Musgrove served as the Director of the Office of Special Education Programs under President Barack Obama and previously served as a classroom teacher, school administrator, district special education director, assistant superintendent, and State Director of Special Education for the Mississippi Department of Education.

Amicus Dr. Robert Pasternack currently serves as the Chief Executive Officer for Ensenar Educational Services, Inc. providing consultation to School Districts, State Departments of Education, and an array of companies serving Students with Disabilities across country. Dr. Pasternack also serves as the Chief Education Officer for Accelify, adding to his consultation with the aforementioned entities throughout the country. Dr. Pasternack served as the Assistant Secretary for the Office of Special Education and Rehabilitative Services under President George W. Bush, and in that capacity worked on the 2004 Reauthorization of IDEA. He served on the President's Commission on Excellence in Special Education; President's Mental Health Commission; and led the Federal Interagency Coordinating Committee during his tenure. During his 45 years in education, Dr. Pasternack has been a classroom teacher, Superintendent, and State Director of Special Education.

As the guardian for his brother with Down Syndrome, he has been an advocate for improving outcomes and results for Students with Disabilities and their families. Dr. Pasternack is a Nationally Certified School Psychologist, certified teacher, administrator, and educational diagnostician.

Amicus Madeleine Will served as the Assistant Secretary of the Office of Special Education and Rehabilitative Services under President Ronald Reagan. Ms. Will has more than 35 years of experience advocating for individuals with intellectual disabilities and their families and developing partnerships of parents and professionals involved in creating and expanding high-quality education and other opportunities for individuals with disabilities. Since her adult son, Jonathan, was born with Down syndrome, she has been involved in disability policy efforts at the local, state, and federal levels. Ms. Will founded the Collaboration to Promote Self-Determination, a network of national disability organizations pursuing modernization of services and supports for persons with intellectual and developmental disabilities, so that they can become employed, live independently in an inclusive community, and rise out of poverty. She has also served as Vice President of the National Down Syndrome Society and Chair of the President's Committee for People with Intellectual Disabilities.

Amicus Michael Yudin served as both the Assistant Secretary of the Office of Special Education and Rehabilitative Services and the Acting Assistant Secretary of the Office of Elementary and Secondary Education under President Barack Obama. In these capacities, Mr. Yudin helped implement both the Individuals with Disabilities Education Act ("IDEA") and the Elementary and Secondary Education Act of

1965, as amended. Prior to his work at the Department of Education, Mr. Yudin spent nine years in the United States Senate, where he worked for senior members of the Senate Health, Education, Labor, and Pensions Committee on education legislation, including the IDEA reauthorization of 2004 and the No Child Left Behind Act of 2001. With more than 25 years of experience in the executive and legislative branches of the federal government, Mr. Yudin has dedicated his career to advocating on behalf of educationally disadvantaged students and individuals with disabilities.

Amici have devoted their professional lives to working for the interests of students with disabilities. In various capacities, they have been responsible for both enforcing and complying with the statutory rights and obligations enacted by Congress for the benefit of students with disabilities and their families. Having been involved in the implementation of the federal statutes at issue in this case, and having led the Department's support of peer-reviewed research into effective approaches to educating students with disabilities, *amici* have a special interest in providing the Court with a perspective based on decades of practical experience.

Amici believe that the Tenth Circuit's "more-than-de-minimis" standard for evaluating the substantive adequacy of the "free appropriate public education" required under the IDEA is contrary to the terms of the statute and to this Court's precedent. Furthermore, the lower court's standard reflects a basic misconception regarding the efficacy of educational methods, behavioral interventions, and assistive technologies that allow students with disabilities to reach levels of achievement and proficiency comparable to all students. This brief seeks to provide a description

of these research-validated approaches and to explain that they offer an opportunity for students with disabilities to meet the State's generally applicable academic standards and to prepare them for post-secondary education, employment, and independent living, enabling them to become productive and contributing adults.

SUMMARY OF ARGUMENT

Over the decades since the Individuals with Disabilities Education Act ("IDEA") was first enacted, extensive research and practical experience have fostered the development of improved teaching methods, educational technology, and behavioral interventions that have improved the efficacy of education for millions of students with disabilities. It is thus both appropriate and realistic to set high expectations and high achievement goals for students with disabilities. Standardized test scores and other educational statistics show that progress is not only possible but happening now.

Students with disabilities have shown substantial gains in a variety of educational success metrics, though an achievement gap still persists between students with disabilities and their non-disabled peers. The achievement gap is being narrowed with the application of current research, most of which is sponsored by the Department of Education ("the Department"), showing how students with disabilities learn. That research, in turn, is informing the approaches and technologies used in the classroom. Intervention plans, behavioral-support strategies, and individualized approaches to teaching and learning, among other innovations in teaching, are showing documented results. Behavioral intervention strategies for students with autism spectrum disorder ("ASD"), such as petitioner here, also have shown that

students with ASD can thrive and achieve proficiency in the general education curriculum.

The proven effectiveness of these educational techniques should inform this Court's interpretation of the IDEA's central guarantee of a "free appropriate public education" ("FAPE") for all students, including students with disabilities. This Court last addressed the meaning of a "free appropriate public education" in 1982, *see Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), but the FAPE standard is not static or tied to teaching methods and expected educational outcomes from decades past. Rather, the FAPE standard must reflect current, and increasingly advancing, teaching methods and the same high expectations for students with disabilities that we have for all students.

Since this Court decided *Rowley* more than 30 years ago, federal education law has changed to keep pace with emerging knowledge and developments in educational praxis. In particular, in 1997 and 2004, Congress amended the IDEA to require public schools to set measurable goals in providing students with disabilities with access to – and enable them to be involved in and make progress in – the general education curriculum. These changes incorporate the standards-based reforms to public education advanced in the Elementary and Secondary Education Act of 1965 ("ESEA") and its reauthorization under the No Child Left Behind Act of 2001 ("NCLB"). Through these laws and associated regulations, Congress and the Department now recognize that we should reject the soft bigotry of low expectations and expect all children, including children with disabilities, to achieve academic success and leave school prepared for college or other postsecondary education, a career, and independence.

ARGUMENT

I. EDUCATION METHODS IN THE SPECIAL EDUCATION CONTEXT HAVE VASTLY IMPROVED SINCE *ROWLEY*

Since this Court decided *Rowley*, educators have developed and implemented more sophisticated methods of supporting the millions of students with disabilities to meet the high expectations that federal law has established for all children. These developments appropriately inform the courts' understanding of the meaning of an *appropriate* education for students with disabilities. No one would question that "appropriate" treatment for tuberculosis changed dramatically with the development of antibiotics. Given the improvements in teaching methods and assistive technologies, it is realistic and therefore appropriate to set high expectations and high achievement goals for students with disabilities.

A. Since *Rowley*, the Achievement Gap Has Narrowed, Although Students with Disabilities Still Lag Behind Non-Disabled Peers in Academic Achievement Metrics

Educational achievement metrics illustrate both the need for and promise of the IDEA. On the one hand, students with disabilities are reaching unprecedented levels of success.[2] The gap between the achievement of students with disabilities and students without disabilities is narrowing as public schools implement evidence-based approaches to

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[2] *See* American Institutes for Research, College & Career Readiness & Success Ctr., *Improving College and Career Readiness for Students with Disabilities* 2-3 (Mar. 2013) ("AIR, *Improving College and Career Readiness*"), http://www.ccrscenter.org/sites/default/files/Improving%20College%20and%20Career%20Readiness%20for%20Students%20with%20Disabilities.pdf.

supporting students with disabilities. At the same time, however, there is still a gap. When expectations for children with disabilities are set too low, they often receive less challenging instruction that reflects below-grade-level content standards, preventing them from learning what they need to learn to succeed at grade-level work. The effects of these low expectations are visible in academic achievement metrics.

Each year, millions of children with a variety of disabilities receive special education and services under the IDEA.[3] In 2014, more than seven million children received IDEA services.[4] Nearly six million were aged six to 21; this represents 8.7% of all such school-aged students.[5] The achievement gap between students with disabilities and other students persists across a variety of subject areas. In 2015,

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[3] A student may be found eligible for IDEA services because the student has an intellectual disability; is deaf or hard of hearing; has a speech or language impairment; a visual impairment, including blindness; an emotional disturbance; orthopedic impairments; an autism spectrum disorder ("ASD"); traumatic brain injury; other health impairments; specific learning disabilities; one or more developmental delays; or multiple disabilities. *See* 20 U.S.C. § 1401(3).

[4] *See* U.S. Dep't of Educ., *38th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, 2016*, at xxi-xxiv (Oct. 2016), http://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/38th-arc-for-idea.pdf. Among students age six through 21, the most prevalent disability category was specific learning disabilities (39.2%), followed by speech or language impairments (17.6%), other health impairments (14.4%), ASD (8.6%), intellectual disability (7%), and emotional disturbance (5.9%); the incidence of ASD within this population increased by 100% between 2005 and 2014. *See id.* at xxiv-xxv, 37 & Ex. 20.

[5] *See id.* at xxiv.

on the National Assessment of Educational Progress ("NAEP"), the average reading score of twelfth-grade students with disabilities was almost 40 points lower (on a 500-point scale) than their counterparts without disabilities.[6] Similarly, the average mathematics score of twelfth-grade students with disabilities was more than 35 points lower than that of students without disabilities.[7]

Between 1990 and 2005, the percentage of students with disabilities who completed high school saw dramatic improvement – from 43% to 61%.[8] But the graduation rate for students with disabilities still lags well behind the average graduation rate for all students, which was 75.5% in 2009. (Since 2009, although graduation rates have continued to improve, the gap has widened: in the 2014-15 school year, the graduation rate for students with disabilities increased to 64.6%, while the graduation rate for all students reached 83.2%.[9])

Enrollment in postsecondary education tells a similar story: students with disabilities have made real and substantial gains, though they still lag behind their non-disabled peers. Between 1990 and 2005, the percentage of students with disabilities

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[6] *See* Nat'l Ctr. for Educ. Statistics, The Nation's Report Card: 2015 Mathematics & Reading at Grade 12, http://www.nationsreportcard.gov/reading_math_g12_2015/#reading/groups (last visited Nov. 17, 2016).

[7] *See id.*

[8] *See* AIR, *Improving College and Career Readiness*, *supra* note 2, at 2-3.

[9] *See* U.S. Dep't of Educ., ED Data Express: Data about elementary & secondary schools in the U.S., National Snapshot, http://eddataexpress.ed.gov/state-report.cfm?state=US&submit.x=42&submit.y=14 (last visited Nov. 17, 2016).

enrolling in any postsecondary program within four years of finishing high school has nearly doubled: from 26.3% to 45.6%.[10] The enrollment percentage for all students, meanwhile, grew from 54% to 62.6%.[11]

In some postsecondary settings, students with disabilities are now graduating at rates approaching and even exceeding general education students. For two-year college programs, for example, students with disabilities complete their programs at a rate of 41.3% compared to 22.4% of general population students.[12] For vocational, business, or technical programs, students with disabilities complete their programs at a rate of 56.7%, nearly as high as the 64.5% rate for all students.[13]

Yet, despite this progress, only 7.6% of students with disabilities attended four-year universities, compared with 29.2% of all students.[14] And, among those who enroll in four-year colleges, students with disabilities graduate less often: 34.2% versus 51.2% for all students.[15]

B. The Achievement Gap Is Narrowing As Schools Across the Country Implement Evidence-Based Teaching Methods

As the progress already achieved demonstrates, public schools are narrowing the achievement gap – an achievement gap that reflects in part the burden

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[10] *See* AIR, *Improving College and Career Readiness*, *supra* note 2, at 2.

[11] *See id.*

[12] *See id.* at 3.

[13] *See id.*

[14] *See id.*

[15] *See id.*

of low expectations for students with disabilities – by applying research-driven advances in educators' understanding about how students with disabilities learn.[16] That improved and improving understanding, in turn, informs the approaches and technologies commonly used in special education instruction and services today.[17]

1. Public schools regularly implement a multi-tiered systems of support to meet the academic and behavioral needs of all students, including students with disabilities.[18]

Using this approach, sometimes called Response to Intervention ("RTI"), schools provide high quality

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[16] The Department of Education funds such research through its National Center for Special Education Research, http://www.ies.ed.gov/ncser/.

[17] *See, e.g.*, Thomas E. Scruggs et al., *Do Special Education Interventions Improve Learning of Secondary Content? A Meta-Analysis*, 31 Remedial & Special Educ. 437-49 (2010) ("Scruggs") (meta-analysis of 70 independent studies investigating effects of special education interventions on student achievement found that students with disabilities made significant progress across different content areas and across different educational settings when they received systematic, explicit instruction; learning strategy instruction; and other evidence-based instructional strategies and supports), *cited in* Final Rule, *Improving the Academic Achievement of the Disadvantaged: Assistance to States for the Education of Children With Disabilities*, 80 Fed. Reg. 50,773, 50,774 (Aug. 21, 2015).

[18] *See* OSEP Technical Assistance Ctr., Positive Behavioral Interventions & Supports, Multi-tiered System of Support (MTSS) & PBIS (defining MTSS as "the practice of providing high-quality instruction and interventions matched to student need, monitoring progress frequently to make decisions about changes in instruction or goals, and applying child response data to important educational decisions"), http://www.pbis.org/school/mtss (last visited Nov. 17, 2016).

core instruction that meets the needs of most students.[19] After identifying students who need additional support, including students with disabilities, schools provide evidence-based interventions of moderate to high intensity to address the individual learning challenges of each student.[20]

For example, public schools may employ intensive interventions to teach children with learning disabilities in reading, writing, and math. Such interventions are characterized by small group or one-on-one instruction, which can occur daily. These interventions feature explicit, systematic instruction address-

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[19] *See* U.S. Dep't of Educ., Office of Special Educ. Programs, A Response to Intervention (RTI) Process Cannot Be Used to Delay-Deny an Evaluation for Eligibility under the Individuals with Disabilities Education Act (IDEA) at 2 (Jan. 21, 2011) ("OSEP Response") ("[m]any [school districts] have implemented successful RTI strategies"; among the core characteristics of such approaches is "high quality research-based instruction in [the] general education setting"), http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf. *See generally* U.S. Dep't of Educ., Office of Special Educ. Programs, IDEAs That Work: Tiered Support, https://ccrs.osepideasthatwork.org/teachers-academic/tiered-support (last visited Nov. 17, 2016).

[20] *See, e.g.*, American Institutes for Research, Ctr. on Response to Intervention, RTI Glossary of Terms ("MTSS allows for the early identification of learning and behavioral challenges and timely intervention for students who are at risk for poor learning outcomes."), http://www.rti4success.org/resources/rti-glossary-terms#MTSS (last visited Nov. 17, 2016); OSEP Technical Assistance Ctr., Positive Behavioral Interventions & Supports, Multi-tiered System of Support (MTSS) & PBIS (defining MTSS as "the practice of providing high-quality instruction and interventions matched to student need, monitoring progress frequently to make decisions about changes in instruction or goals, and applying child response data to important educational decisions"), http://www.pbis.org/school/mtss (last visited Nov. 17, 2016).

ing critical elements associated with success – such as, for reading, concepts about print conventions, phonemic awareness, phonics, and fluency.[21] Schools adjust the intensity and nature of interventions depending on the student's responsiveness. Studies show that students with disabilities engaged in such interventions regularly show academic gains.[22] Schools screen students to determine which students need additional interventions; continually monitor the progress of all students; and make decisions

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[21] *See also Scruggs*, *supra* note 17 (examining evidence base for using mnemonic strategies, spatial organizers, classroom learning strategies, computer-assisted instruction, peer mediation, study aids, activity-oriented learning, and explicit instruction in teaching middle school and high school students with disabilities, and finding mean effect sizes indicating that the strategies had a large impact); Council for Exceptional Children, Div. for Learning Disabilities, *Intensive Interventions for Students With Learning Disabilities in the RTI Era* at 1 (Feb. 2014), http://s3.amazonaws.com/cmi-teaching-ld/assets/attachments/180/DLD_PP_1_IntensiveInst-2014.pdf?1395418397.

[22] *See Scruggs*, *supra* note 17; *see also* U.S. Dep't of Educ., Inst. of Educ. Sciences, Nat'l Ctr. for Special Educ. Research, *Investment in Reading Research from Kindergarten through High School* at 1 (Oct. 2015) ("*Investment in Reading Research*"), https://ies.ed.gov/ncser/pdf/Reading_2015.pdf; U.S. Dep't of Educ., Inst. of Educ. Sciences, *Synthesis of IES-Funded Research on Mathematics: 2002-2013* (July 2016), http://ies.ed.gov/ncer/pubs/20162003/pdf/20162003.pdf; U.S. Dep't of Educ., Inst. of Educ. Sciences, Nat'l Ctr. for Special Educ. Research, *What Have We Funded? A Summary of Mathematics Research* (Oct. 2015) ("*What Have We Funded?*"), https://ies.ed.gov/ncser/pdf/Math_2015.pdf. Citing a number of studies, the Department has noted that "low-achieving students with disabilities who struggle in reading and low-achieving students with disabilities who struggle in mathematics can successfully learn grade-level content when they have access to high-quality instruction." 80 Fed. Reg. at 50,777 (footnotes omitted).

about the effectiveness of both core instruction and targeted interventions based on student data.[23]

Public schools also implement supports for student behavior. Systems of behavioral supports such as schoolwide positive behavioral interventions and supports ("PBIS") involve setting universal behavioral expectations, and then using data to determine which students need additional behavioral supports.[24] Schools may employ more intensive strategies for groups of students who are exhibiting at-risk behaviors, and individualized services for students who continue to exhibit problematic behavior.[25] Research has shown that successful implementation of schoolwide PBIS

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[23] *See, e.g.*, OSEP Response, *supra* note 19, at 1-2.

[24] *See* OSEP Technical Assistance Ctr., Positive Behavioral Interventions & Supports, Tier 3 Supports ("Positive behavior intervention and support is an application of a behaviorally-based systems approach . . . . Attention is focused on creating and sustaining Tier 1 (universal for ALL students), Tier 2 (targeted group support for SOME students), and Tier 3 (individual support for a FEW students) systems of support that improve lifestyle results (personal, health, social, family, work, recreation) for all children and youth by making problem behavior less effective, efficient, and relevant, and desired behavior more functional."), http://www.pbis.org/school/tier3supports (last visited Nov. 17, 2016); *id.*, Multi-tiered System of Support (MTSS) & PBIS ("Positive Behavioral Interventions and Supports (PBIS) is a process that is consistent with the core principles of MTSS."), http://www.pbis.org/school/mtss (last visited Nov. 17, 2016).

[25] *See* U.S. Dep't of Educ., Office of Special Educ. & Rehabilitative Services, *Effective Evidence-based Practices for Preventing and Addressing Bullying* at 2 (Enclosure to Aug. 20, 2013 Dear Colleague Letter on Bullying), http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-enclosure-8-20-13.pdf.

can be linked to improved academic outcomes among students.[26]

Such systems of instructional and behavioral supports effectively engages and supports all students in the school, including those with disabilities.[27]

2. Schools, including those that provide instructional and behavioral supports, are also guided by the principles of Universal Design for Learning ("UDL"), which focuses on individualizing approaches to teaching and learning.[28]

These principles acknowledge that all students, including students with disabilities, differ in how they comprehend information; how they express what they know; and how they are engaged in instruction.[29] In implementing UDL, teachers address the

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[26] *See* U.S. Dep't of Educ., Inst. of Educ. Sciences, *A Compendium of Social-Behavioral Research Funded by NCER and NCSER: 2002-2013*, at 99 (2016), http://ies.ed.gov/ncer/pubs/20162002/pdf/20162002.pdf.

[27] *See* Schoolwide Integrated Framework for Transformation, SWIFT Guide: Inclusive Academic Instruction ("Schools use multi-tiered instructional strategies [and] differentiation . . . to support instruction [for] all students, including those with the most extensive support needs. Academic and behavior supports are integrated within one multi-tiered system of support."), http://guide.swiftschools.org/multi-tiered-system-of-support/inclusive-academic-instruction (last visited Nov. 17, 2016).

[28] *See* Massachusetts Dep't of Elementary & Secondary Educ., The Massachusetts Tiered System of Supports (MTSS) (last updated Oct. 11, 2011) (explaining that schools implementing MTSS are guided by UDL principles), http://www.doe.mass.edu/sped/mtss.html (last visited Nov. 17, 2016); Nat'l Ctr. on Universal Design for Learning, What is UDL?, http://www.udlcenter.org/aboutudl/whatisudl (last visited Nov. 17, 2016).

[29] *See* Nat'l Ctr. on Universal Design for Learning, The Three Principles of UDL, http://www.udlcenter.org/aboutudl/whatisudl/3principles (last visited Nov. 17, 2016).

variability of student learning by implementing flexible goals, methods, materials, and assessments. Curriculum is customizable, and instruction is differentiated.[30]

UDL is an evidence-based strategy for implementing inclusive practice, meaning students with disabilities are included in classrooms with students without disabilities.[31] The Department has found that students with disabilities who spend most of their time in general education classes have higher test scores in reading and mathematics than students who spend most of their time in separate schools and classes.[32] The Department has also found that

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[30] *See* What is UDL?, *supra* note 28. Congress recognized the success of UDL as an approach to helping all students achieve proficiency, including students with disabilities, in the Every Student Succeeds Act of 2015 ("ESSA"), which reauthorized the ESEA and which requires States to develop academic assessments consistent with UDL, *see* 20 U.S.C. § 6311(b)(2)(B)(xiii), (b)(2)(D)(i)(IV), and requires schools providing federally funded comprehensive literacy instruction to incorporate UDL in the instruction, *see id.* § 6311(b)(2)(J). The ESSA takes its definition of UDL from that in the Higher Education Act of 1965, *see id.* § 1003(24) (defining UDL as "a scientifically valid framework for guiding educational practice that . . . provides flexibility in the ways information is presented, in the ways students respond or demonstrate knowledge and skills, and in the ways students are engaged; and . . . reduces barriers in instruction, provides appropriate accommodations, supports, and challenges, and maintains high achievement expectations for all students, including students with disabilities").

[31] *See, e.g.*, Massachusetts Dep't of Elementary & Secondary Educ., *Inclusive Practice in Massachusetts: Teacher preparation program overview of evidence-based best practices*, http://www.doe.mass.edu/edeval/guidebook/edprep/InclusivePractice.pdf (last visited Nov. 17, 2016).

[32] *See* Mary Wagner & Jose Blackorby, *Overview of Findings from Wave 1 of the Special Education Elementary Longitudinal*

inclusion is associated with better postsecondary outcomes, including in employment, postsecondary education, and income.[33] Children with significant disabilities are now being included in general education settings in every State and school district in the country.

3. Educators now have many highly effective interventions that can help every student meet the state academic standards that apply to all students.[34] Teams developing individualized education programs ("IEPs") in public schools nationwide prescribe such interventions to students with disabilities as needed

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Study (SEELS) 24 (June 2004), http://www.seels.net/designdocs/seels_wave1_9-23-04.pdf; Jose Blackorby et al., *What Makes a Difference? Influences on Outcomes for Students with Disabilities* 7-7 (Feb. 2007), http://www.seels.net/designdocs/SEELS_W1W3_FINAL.pdf.

[33] *See* Mary Wagner et al., *What Makes a Difference? Influences on Postschool Outcomes of Youth with Disabilities: The Third Comprehensive Report from the National Longitudinal Transition Study of Special Education Students* 4-8 to 4-9 & Table 4-5 (Dec. 1993), http://files.eric.ed.gov/fulltext/ED365085.pdf.

[34] *See* U.S. Dep't of Educ., Office of Special Educ. & Rehabilitative Services, Dear Colleague Letter on FAPE at 1 (Nov. 16, 2015) ("Dear Colleague Letter on FAPE") ("Research has demonstrated that children with disabilities who struggle in reading and mathematics can successfully learn grade-level content and make significant academic progress when appropriate instruction, services, and supports are provided.") (citing 80 Fed. Reg. at 50,776), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf. *See generally* Thomas Hehir, *New Directions in Special Education: Eliminating Ableism in Policy and Practice* 18-39 (2005) ("Hehir, *New Directions*"). The Department has sponsored research that has tested the effectiveness of many such interventions; evidence-based tools and supports for teachers and families are available at https://ccrs.osepideasthatwork.org/.

to provide a FAPE. For example, research has shown that, to meet state academic standards for reading and prepare for adult life, deaf children should learn to use manual language, such as American Sign Language ("ASL"), from infancy – even before learning to read.[35] Depending on the level of impairment, students with visual impairments should be taught Braille or should receive accommodations such as large-print text;[36] these approaches can be used along

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[35] *See* Hehir, *New Directions* at 18-39; *see also* Ronnie B. Wilbur, *The Use of ASL to Support the Development of English and Literacy*, 5 J. Deaf Stud. & Deaf Educ. 81, 98 (2000) ("The research reviewed here provides strong support for the use of ASL as a medium of communication before a child enters school and continuing into the classroom to develop cognition, socialization, and an age-appropriate knowledge base, as well as providing a basis for learning English and English literacy."), http://jdsde.oxfordjournals.org/content/5/1/81.full.pdf; Shirin D. Antia et al., *Academic Status and Progress of Deaf and Hard-of-Hearing Students in General Education Classrooms*, 14 J. Deaf Stud. & Deaf Educ. 293, 308 (2009) (study finding that "communication measures" including "language ability" but also "skills such as using an interpreter, communication assertiveness, communication repair, and the ability to match communication mode and register to one's audience" were "significantly correlated to math, reading, and language/writing achievement"), http://jdsde.oxfordjournals.org/content/14/3/293.full.pdf+html; U.S. Dep't of Justice & U.S. Dep't of Educ., *Meeting the Communication Needs of Students with Hearing, Vision, or Speech Disabilities* at 2 (Nov. 12, 2014) ("*Meeting Communication Needs*") (listing interventions for students who are deaf or hard of hearing, including exchange of written materials, interpreters, note takers, real-time computer-aided transcription services (such as CART), assistive listening systems, accessible electronic and information technology, and open and closed captioning), http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-parent-201411.pdf.

[36] *See Meeting Communication Needs*, *supra* note 35, at 2 (listing interventions for students with visual disabilities, including readers, taped texts, audio recordings, Braille materials

with technologies such as audio-supported reading to help students achieve proficiency.[37] Students with visual impairments may need orientation and mobility ("O&M") services, such as learning to walk with a cane, to achieve independence.[38] And students with

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and refreshable Braille displays, accessible e-book readers, screen reading software, magnification software, optical readers, secondary optical programs, and large-print materials); *see also* U.S. Dep't of Educ., Office of Special Educ. Programs, Dear Colleague Letter on Braille at 1, 6 (June 19, 2013) (noting that the 1997 amendments required schools to consider whether a student with a visual impairment should receive instruction in Braille and the use of Braille, and that "Braille is a very effective reading and writing medium for many blind and visually impaired persons, and research has shown that knowledge of Braille provides numerous tangible and intangible benefits"), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/braille dcl-6-19-13.pdf.

[37] *See* Nat'l Ctr. on Accessible Educ. Materials, Audio-Supported Reading ("Audio-supported reading . . . allows a user to listen to a spoken version of text while looking at screen-displayed print or touching braille. . . . With sufficient practice, both braille readers and magnified print readers can greatly increase the rate at which they move through text using [audio-supported reading]."), http://aem.cast.org/navigating/audio-supported-reading.html#.WCIdMI-cG70 (last visited Nov. 17, 2016).

[38] The Department's IDEA regulation specifies orientation and mobility services as a related service a school must provide to a student with a disability when necessary to provide FAPE, and defines it as "services provided to blind or visually impaired children by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home, and community." 34 C.F.R. § 300.34(c)(7)(i). *See* Jennifer L. Cmar et al., Council for Exceptional Children, *The Role of the Orientation and Mobility Specialist in Public Schools* 1 (2015) (citing studies and stating that "O&M skills allow children to interact with and move through environments purposefully and independently, and they facilitate access to educational, vocational, social, and recreational

other disabilities may also benefit from assistive technology devices, which the IDEA defines as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities" of a student with a disability. 20 U.S.C. § 1401(1)(A). For example, students with learning disabilities, intellectual disabilities, autism, and other disabilities may benefit from assistive technologies such as taped books, e-book readers, or word processing "spell check" programs to access instruction and demonstrate mastery of material on writing assignments and assessments.[39]

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opportunities") (citations omitted), *available at* http://community.cec.sped.org/dvi/resourcesportal/positionpapers.

[39] *See* Hehir, *New Directions* at 27-35; *see also* Nat'l Ctr. on Accessible Educ. Materials. Understanding DAISY (Digital Accessible Information SYstem) (readers with learning disabilities may find digital talking books "easier and more enjoyable to read and use than a print-based text"), http://aem.cast.org/creating/understanding-daisy.html#.WCIr7I-cG70 (last visited Nov. 17, 2016); U.S. Dep't of Educ., Office for Civil Rights. Frequently Asked Questions About the June 29, 2010, Dear Colleague Letter at 2, 7 (May 26, 2011) (stating that e-book readers may be needed by students with learning disabilities in public elementary and secondary schools who have difficulty getting information from printed sources, and that they provide "greater functionality" than audio books), http://www2.ed.gov/about/offices/list/ocr/docs/dcl-ebook-faq-201105.pdf; Louise Spear-Swerling, LD Online. *Spelling and Students with Learning Disabilities* (Dec. 2005) (recommending that older students be taught to use a computer spell-checker, which "can be enormously helpful to struggling spellers and writers, especially in the later grades when the volume of writing increases greatly"), http://www.ldonline.org/spearswerling/Spelling_and_Students_with_Learning_Disabilities; Julia K. Landau et al., LD Online, *Examples of Accommodations from State Assessment Policies* (listing word processor spell-check function as example of "response

Taken together, these methods show that schools can enable students with disabilities to improve their academic performance significantly, as demonstrated by their substantial gains in recent years. Schools, in short, and in comparison to when *Rowley* was decided in 1982, now have a variety of increasingly advanced educational methods and tools at their disposal, including intensive interventions in early childhood; robust accommodations to achieve progress in the general education curriculum and minimize the need to modify that curriculum; testing accommodations that mirror instructional accommodations; increasing learning time; and raising expectations for what constitutes success. As a result, students with disabilities may be expected to become proficient in the grade-level curriculum and to meet state academic standards.[40]

4. Educators have developed many interventions for students with ASD who may, like petitioner here, have behavioral challenges.[41]

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accommodation" in state academic assessments), http://www.ldonline.org/article/6187 (last visited Nov. 17, 2016).

[40] *See* Hehir, *New Directions* at 136-44. States are also improving the accessibility of achievement test items, such as adjusting format characteristics or content, or making test items more accessible and understandable (including by reducing unimportant or extraneous details) to better measure students' progress in learning grade-level content. *See* 80 Fed. Reg. at 50,775.

[41] *See* U.S. Dep't of Educ., Inst. of Educ. Sciences, Nat'l Ctr. for Special Educ. Research, *Summary of Autism Spectrum Disorders Research* at 1 (Oct. 2015) ("*Autism Spectrum Disorders Research*") (noting that ASD symptoms may vary in severity and may include social communication and interaction deficits; restrictive and repetitive behaviors, interests, and activities; intellectual impairment; sensory sensitivity; attention and execu-

Although children with ASD are very diverse, each with different strengths and sometimes complex needs, many children with ASD engage in challenging behavior because they have not developed functional communication skills or been given the tools to communicate effectively. Functional communication training ("FCT") helps students with ASD learn to avoid or replace those challenging behaviors, leading to better education outcomes.[42] Such training involves a school-based team, including the student's parents, the student, teachers, administrative staff, and specialists, coming together to conduct a functional behavior assessment to determine the function of problem behavior.[43] The team then identifies a communicative response that serves the same function as the problem behavior, and determines how and

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tive functioning problems, motor difficulties, and behavior problems), http://ies.ed.gov/ncser/pdf/ASD_2015.pdf.

[42] *See id.* at 2 ("social and communication skill impairments are core symptoms of ASD"); Robert C. Pennington & G. Rich Mancil, *Functional Communication Training, in* Darlene E. Perner & Monica E. Delano, Council for Exceptional Children, *A Guide to Teaching Students With Autism Spectrum Disorders* ch. 5 (2013) ("Pennington & Mancil, *Functional Communication Training*").

[43] *See* Pennington & Mancil, *Functional Communication Training*, *supra* note 42; *see also* G. Richmond Mancil, *Functional Communication Training: A Review of the Literature Related to Children with Autism*, 41 Educ. & Training in Developmental Disabilities 213, 214 (2006) (defining "functional communication training" as assessing the function of a behavior through functional behavior assessments and then replacing the challenging behavior with a communicative response that serves the same function), http://daddcec.org/Portals/0/CEC/Autism_Disabilities/Research/Publications/Education_Training_Development_Disabilities/2006v41_Journals/ETDD_200609v41n3p213-224_Functional_Communication_Training_A_Review_Literature_Related.pdf.

when the student will be taught the replacement response, as part of a behavior intervention plan.[44]

Other evidence-based behavioral interventions for students with ASD include preteaching, prompting, and positively reinforcing desired behavior. Teachers or peer students may also model desired behavior, or redirect the student from destructive behavior. Students may learn prelinguistic strategies (such as holding a favorite object) or cognitive-linguistic strategies (such as learning to use specific vocabulary to describe one's emotional state) to more effectively self-regulate behavior.[45] Sometimes, it is simply a matter of offering a student an opportunity to regroup from overwhelming outside stimuli.[46]

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[44] *See* Mancil, *Functional Communication Training*, 41 Educ. & Training in Developmental Disabilities at 214 (after replacing challenging behavior with a functional communicative response, "[t]he final step in FCT involves ignoring the challenging behavior" and "prompting and acknowledging the use of the communicative response that replaces the challenging behavior"). The requirement that schools perform a functional behavioral assessment and develop or revise a behavior intervention plan when a student with a disability is repeatedly suspended, or suspended or expelled for more than 10 days, was included in the IDEA as part of the 1997 amendments. *See* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 101, 111 Stat. 37, 93-94 (codified as amended at 20 U.S.C. § 1415(k)(1)). And the Department has recently clarified that schools must implement such approaches where needed to provide FAPE. *See infra* Part II.B.3.

[45] *See* Barry M. Prizant, Ph.D., et al., *The SCERTS Model: A Transactional, Family-Centered Approach to Enhancing Communication and Socioemotional Abilities of Children With Autism Spectrum Disorder*, 16 Infants & Young Children 296-316 (2003), http://journals.lww.com/iycjournal/Abstract/2003/10000/The_SCERTS_Model__A_Transactional,_Family_Centered.4.aspx.

[46] *See* Pennington & Mancil, *Functional Communication Training*, *supra* note 42; *see also* Cleveland Clinic, Behavioral Inter-

Public schools are regularly prescribing such interventions from a robust array of behavioral and other interventions for students with ASD. As a result, such students are accessing the general education curriculum and improving their academic performance.[47]

Even for the small number of students with ASD who have significant cognitive disabilities, schools are expected to – and can – provide extensive, direct individualized instruction and support. For these students, as for other students with intellectual or developmental disabilities, research has demonstrated that comprehensive reading instruction, through programs that emphasize phonological awareness and phonics skills, produce better outcomes than instruction that provides sight words alone.[48] Other research demonstrates that teaching students with moderate and severe intellectual disabilities specific math problem-solving interventions helps them learn

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vention for Children with Autism, http://my.clevelandclinic.org/childrens-hospital/specialties-services/departments-centers/center-for-autism/behavioral-intervention-autism (last visited Nov. 17, 2016).

[47] *See Autism Spectrum Disorders Research*, *supra* note 41, at 2-10; *see also* Wendy Machalicek et al., *A Review of School-Based Instructional Interventions for Students with Autism Spectrum Disorders*, 2 Research in Autism Spectrum Disorders 395-416 (2008) (evaluating research indicating effective methods in teaching students with ASD academic skills, communication skills, functional life skills, play, and social skills), http://www.meadowscenter.org/files/resources/RASD-Machalicek-08.pdf.

[48] *See Investment in Reading Research*, *supra* note 22, at 4. Students with intellectual disabilities may need such instruction for 2-3 years longer than for typically developing students to achieve basic levels of literacy. *See id.* at 4-5.

grade-level content in math.[49] The goal for these students, as for all students with disabilities, is to achieve measurable gains within challenging, grade-level state academic content standards, so that they are on track to pursue postsecondary education or competitive, integrated employment.[50]

II. THE EVOLVING LEGAL AND REGULATORY CONTEXT REFLECTS ADVANCES IN INSTRUCTIONAL PRACTICES

Education experts agree that a "free appropriate public education" must be "appropriate" so that each student with a disability, in light of current methods of instruction, can achieve the same challenging academic standards as students without disabilities. Educational standards must reflect the same high expectations for students with disabilities that we have for all students. Statutory and regulatory developments over the last two decades reflect that consensus.

A. The IDEA Requires a "Free Appropriate Public Education"

1. The IDEA requires an education that is appropriate to meet the child's unique needs and prepare the child for further education, employment, and independent living, through individualized special education and related services. *See* 20 U.S.C. § 1400(d)(1)(A).

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[49] *See What Have We Funded*, *supra* note 22, at 3-4.

[50] *See* Dear Colleague Letter on FAPE, *supra* note 34, at 4-5; Notice of Proposed Rulemaking, *Title I – Improving the Academic Achievement of the Disadvantaged: Academic Assessments*, 81 Fed. Reg. 44,928, 44,953 (July 11, 2016) (proposed ESSA regulation developed through negotiated rulemaking, defining "students with the most significant cognitive disabilities").

A "free appropriate public education" must include "special education and related services" that "meet the standards of the State educational agency," in "an appropriate preschool, elementary school, or secondary school education in the State involved," and be "provided in conformity with [an] individualized education program" or IEP. *Id.* § 1401(9)).

An IEP must state "measureable annual goals" designed to enable the child to "be involved in and make progress in the general education curriculum" and "meet each of the child's other educational needs that result from the child's disability." *Id.* § 1414(d)(1)(A)(i)(II). The State must provide "the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable" to attain those goals. *Id.* § 1414(d)(1)(A)(i)(IV).

"Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability." *Id.* § 1401(29). The Department has clarified that "specially designed instruction" must ensure that the child has access to the general education curriculum, so that the child "can meet the educational standards within the jurisdiction . . . that apply to all children." 34 C.F.R. § 300.39(b)(3).

2. The last time the Court addressed the "free appropriate public education" standard was in *Rowley* in 1982. In *Rowley*, this Court wrote that "the 'basic floor of opportunity' provided by [a FAPE] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." 458 U.S. at 201. The Court also clarified that the access to education must be "meaningful" and that a FAPE must be "personalized." *Id.* at 192,

202-03. The Court specifically noted that its holding should be limited to a student who, like Amy Rowley, meets grade-level expectations – and that it was not announcing a universal standard for educational attainment intended to prescribe what schools must do for all students with disabilities. *See id.* at 209-10 (noting that Amy Rowley "performs better than the average child in her class and is advancing easily from grade to grade").

B. The IDEA Has Changed in the 34 Years Since This Court Decided *Rowley*

The IDEA has changed since *Rowley*. Working in concert with the Department, Congress has made key amendments to the statute that further clarify the meaning of a FAPE for students with disabilities. In short, Congress has strengthened the statutory goal that children with disabilities achieve the same high standards as all children. To this end, Congress holds States and local school districts accountable, requiring them to support children with disabilities so that they can learn and become proficient in the grade-level academic content taught to all students. And Congress has indicated that educational and related services provided to students with disabilities should change and improve over time to incorporate new successful methods.

1. Congress's 1997 amendments to the IDEA added the requirement that students with disabilities have measurable goals that enable them to make progress in the general education curriculum. *See* Pub. L. No. 105-17, § 101, 11 Stat. 84 (IDEA § 614(d)(1)(A)(ii)). It also requires schools to describe how each student's progress toward those goals will be measured. *See id.*, 11 Stat. 85 (IDEA § 614(d)(1)(A)(viii)).

The 2004 amendments to the IDEA align the statute with the reauthorization of the Elementary and Secondary Education Act of 1965 ("ESEA") through the No Child Left Behind Act of 2001 ("NCLB"). As amended, the ESEA requires States to develop challenging academic content standards that apply to all students, and it established the expectation that all students, including students with disabilities, will be proficient under those standards. *See generally* 20 U.S.C. § 1412(a)(15), (16).

Most recently, the 2015 authorization of the ESEA through the Every Student Succeeds Act ("ESSA") retains the requirement that children with disabilities are held to the same challenging state academic content standards as are all students. *See id.* § 6311(b)(1). These standards must be aligned with the entrance requirements for public colleges and universities in each State. *See id.* § 6311(b)(1)(D)(i).[51]

2. Applying Congress's statutory framework, in recent years the Department has clarified how the IDEA must be aligned with the ESEA's high expectations for all students, including students with disabilities, and now holds States accountable for the achievement of students with disabilities.

The Department has clarified that, in order to provide a free appropriate public education, a student's IEP must be designed to enable the child to be involved in and make progress in the general education curriculum – the same curriculum for non-disabled children (based on the state academic

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[51] *See also* 20 U.S.C. § 6301 (ESSA's purpose is "to provide *all children* significant opportunity to receive *a fair, equitable, and high-quality education*, and to close educational achievement gaps") (emphases added).

content standards for the grade in which the child is enrolled).[52]

For all students with disabilities, schools must:

- Address the unique needs of the student related to the student's disability, by providing individualized special education and supportive related services;[53]
- Ensure the student's access to the general education curriculum (*i.e.*, the same curriculum as for non-disabled students), so that the student can meet the state academic standards that apply to all students in the State, for the grade in which the student is enrolled; and
- Prepare the student for college, career, and independence.[54]

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[52] *See* Dear Colleague Letter on FAPE, *supra* note 34 (summarizing the changes in the IDEA and the ESEA that support this statement of the law's requirements).

[53] In enacting the 2004 amendments to the IDEA, Congress acknowledged that, in addition to providing an education to students with disabilities that "conform[s] to State and district wide academic content standards and progress indicators consistent with standards based reform within education and the new requirements of NCLB," schools must also "include other goals that the IEP Team deemed appropriate for the student, such as life skills, self-advocacy, social skills, and desired post-school activities." S. Rep. No. 108-185, at 29 (2003), *quoted in* 80 Fed. Reg. at 50,779-80.

[54] As the Department has stated: "[P]ublic schools should prepare all children to be ready for college or the workforce. According to research . . . , nearly two-thirds of new jobs require some form of postsecondary education. Therefore, in order to compete in the 21st century, regardless of whether a student has a disability, some form of postsecondary training or education is increasingly important for the student to become a

For the very small number of students with the most significant cognitive disabilities, States may measure their performance against alternate academic achievement standards, which may vary in scope or complexity. But those standards still must be aligned with and clearly related to the State's grade-level content standards for the grade in which the student is enrolled. And the goal remains to put these students on track to pursue postsecondary education or competitive and integrated employment.[55]

In addition, for all students, where the student's academic performance is significantly below grade level, IEP goals should be ambitious but achievable. Thus, annual goals may not result in the child's achieving grade-level with a single year, but they should still be sufficiently ambitious to help close the gap.[56]

The Department has also clarified that – as the IDEA requires, *see* 20 U.S.C. § 1414(d)(3)(B)(i) – when a child's behavior impedes the child's learning or that of others, the IEP team must consider and,

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productive and contributing adult." 80 Fed. Reg. at 50,778 (citing Achieve, Inc., *The Future of the U.S. Workforce: Middle Skills Jobs and the Growing Importance of Post Secondary Education* (2012), http://www.achieve.org/files/MiddleSkillsJobs.pdf).

[55] *See* Dear Colleague Letter on FAPE, *supra* note 34, at 4-5; *see also* Final Rule, *Title I – Improving the Academic Achievement of the Disadvantaged*, 68 Fed. Reg. 68,697, 68,704 (Dec. 9, 2003); 20 U.S.C. § 6311(b)(1)(E)(i) (authorizing States to adopt "alternate academic achievement standards," but requiring such alternate standards to be aligned with the State's "challenging . . . academic content standards" and to reflect "professional judgment as to the highest possible standards achievable by" students with most significant cognitive disabilities).

[56] *See* Dear Colleague Letter on FAPE, *supra* note 34, at 5.

when necessary, include in the IEP the use of positive behavioral interventions and supports, and other strategies, to address that behavior. The goal, here again, is to address problematic behavior so that the child can be involved in and make progress in the general education curriculum and meet the State's challenging academic standards for all students.[57]

3. States and school districts understand that they will be held accountable for educating students with disabilities so that they can meet state academic standards. In particular, the Department announced in May 2014 that States would be measured on the performance of students with disabilities on state academic assessments and graduation rates. States now use these metrics to identify gaps in performance and implement targeted, systematic interventions in school districts where students with disabilities are not meeting state academic standards.[58]

CONCLUSION

The judgment of the court of appeals should be reversed.

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[57] *See* U.S. Dep't of Educ., Office of Special Educ. & Rehabilitative Services, Dear Colleague Letter on Ensuring Equity and Providing Behavioral Supports to Students with Disabilities at 1, 4 (Aug. 1, 2016), http://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf.

[58] *See* U.S. Dep't of Educ., Letter to Chief State School Officers at 1 (May 21, 2014), http://www2.ed.gov/about/offices/list/osers/osep/rda/050914rda-lette-to-chiefs-final.pdf.

Respectfully submitted,

IRA A. BURNIM
LEWIS BOSSING
THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW
1101 15th Street, N.W.
Suite 1212
Washington, D.C. 20005
(202) 476-5730

November 21, 2016

AARON M. PANNER
Counsel of Record
JOSHUA HAFENBRACK
FREDERICK GASTON HALL
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(apanner@khhte.com)

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In The Supreme Court of the United States

ENDREW F., a Minor, By and Through His Parents and Next Friends, Joseph F. and Jennifer F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION IN SUPPORT OF NEITHER PARTY

STEPHEN A. MILLER
Counsel of Record
KARA L. KAPP
COZEN O'CONNOR
One Liberty Place
1650 Market Street
Suite 2800
Philadelphia, PA 19103
samiller@cozen.com
(215) 665-4736
Counsel for Amicus Curiae National Association of State Directors of Special Education

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

What is the level of educational benefit that local education agencies (LEAs) must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (IDEA)?

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INTERESTS OF *AMICUS CURIAE*

In accordance with Supreme Court Rule 37, *Amicus Curiae* National Association of State Directors of Special Education ("NASDSE") respectfully submits this brief in support of neither party.[1] NASDSE is a not-for-profit organization established in 1938 to promote and support education programs and related services for children and youth with disabilities. NASDSE's members include the state directors of special education, the Part B data managers and the 619 coordinators in the states, the District of Columbia, the Department of Defense Education Agency, the Bureau of Indian Education, federal territories and the Freely Associated States. NASDSE's mission is to work with state educational agencies to ensure that all children and youth with disabilities receive the educational supports and services they need to be prepared for post-school education, career, and independent living choices. NASDSE accomplishes its mission by establishing and maintaining relationships with those individuals and groups responsible for the development of policies, educational and other programs serving individuals with disabilities, and those responsible for

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[1] Pursuant to Rule 37.3(a), all parties received timely notice of the intent to file this brief and have consented to the filing of this brief. Letters showing such consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, *Amicus* notes that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus* or its counsel made a monetary contribution to the preparation and submission of this brief.

implementation at the school, local district, state and national levels. NASDSE regularly represents its members' interests before federal courts and has participated as *amicus curiae* in several cases before this Court involving the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq. See, e.g.*, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009).

Amicus has a profound interest in the Court's resolution of the instant matter. *Amicus* and its members believe all children with disabilities have a right to a free appropriate public education. Without addressing the specific facts of this case, *Amicus* offers arguments and information from its experience "in the field" that we hope will assist this Court in reaching a decision reinforcing the use of collaborative means to resolve the disagreements arising between parents and schools in matters relating to students with disabilities. Our experience confirms that educators of students with disabilities are already providing – on a daily basis and all across the country – those students an education that is more than "just-above-trivial" and that is specifically tailored to individual student needs.

SUMMARY OF ARGUMENT

Amicus possesses decades of experience educating children with disabilities. We understand acutely the ways in which both the educational backdrop and expectations under the Individuals with Disabilities Education Act ("IDEA") have evolved in the thirty-four

years since this Court decided *Board of Education v. Rowley*, 458 U.S. 176 (1982), and the forty-one years since Congress originally enacted the IDEA. Over that time, Congress has recognized and responded to this evolution through a series of amendments to the IDEA and other federal education laws establishing significantly higher academic expectations for students with disabilities that go beyond merely providing for their inclusion. Instead, Congress has continually strengthened the requirements of the IDEA and other education laws in an effort to provide every student with disabilities a quality education and preparation for post-secondary opportunities.

Our member-educators across the country have adapted to implement these more rigorous requirements. Today, public school educators across the country set high expectations for students with disabilities – focusing on their abilities, not their disabilities – consistent with the 1997 and 2004 amendments to IDEA, as well as the 2000 amendments to the Elementary and Secondary Education Act in the No Child Left Behind Act. *See also* Every Student Succeeds Act, 20 U.S.C. § 6301, *et seq.*, P.L. 114-95.

In other words, our member-educators already apply these high standards every day in the field. We can attest that our educators are prepared to and do provide an education at a level more meaningful than the Tenth Circuit's "just-above-trivial" standard. Our educators tailor their efforts to each individual student to make sure that each student's education is *meaningful* in light of the specific abilities and educational

challenges. Our member-educators believe that this standard better serves the students and their families, the schools they attend, and the communities in which they are located.

ARGUMENT

I. The IDEA Has Markedly Evolved in the Thirty-Four Years Since this Court Decided *Rowley*.

In the 1970s, Congress began to address the educational crisis caused by wholly excluding children with disabilities from access to public schools and a meaningful public education. *See Rowley*, 458 U.S. at 179 (summarizing Congress's findings that children with disabilities "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out' "). In 1975, Congress enacted the Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975), later amended and renamed the IDEA. The Act's overarching goal was to address this crisis and create a norm of inclusion. Thus, the IDEA provided that, in all states receiving federal education funds for special education programs, every child with a disability is entitled to a free appropriate public education ("FAPE"). *Rowley*, 458 U.S. at 775. To provide a FAPE, parents and public school educators collaborate to create annual individualized education programs ("IEPs") which, consistent with the wide range of abilities

present in children with disabilities, are "tailored to the unique needs" of each child. *Rowley*, 458 U.S. at 181; *see also* 20 U.S.C. § 1414(b)(4), (d)(1)(B); 34 C.F.R. § 300.327.

This Court first addressed the requirements of the IDEA in 1982 in *Rowley*, 458 U.S. at 176. At that time, many schools were struggling to achieve the IDEA's goal of basic inclusion. Operating in that context, the Court expressly declined to specify the level of benefit to which children with disabilities were entitled. *Id.* at 202. The Court recognized that students with disabilities may have "dramatically" different capabilities. *Id.* Indeed, it cited these very differences in explaining why it declined to "establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.*

When Congress revisited the IDEA decades later, the educational backdrop had dramatically evolved. Consistent with this shifting context, the 1997 Amendments to the IDEA set significantly higher expectations for the inclusion of students with disabilities. The 1997 Amendments broadened the IDEA's goals from simply a baseline of inclusion to "ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1). In reauthorizing the IDEA, Congress required states to include children with disabilities in statewide educational assessments. *Id.* § 1412(a)(16). In sum, these amendments "place[d]

greater emphasis on improving student performance and ensuring that children with disabilities [would] receive a quality public education." *Forest Grove Sch. Dist.*, 557 U.S. at 239 (quoting S. Rep. No. 105-17, at 3 (1997)).

By 2004, public schools across the nation had implemented these more rigorous standards, including striving to provide every student a quality education and preparing students with disabilities to be able to graduate high school and prepare for full participation in life and their communities after high school. Reflecting this progress, Congress revisited the IDEA again in 2004, codifying in even stronger requirements the importance of setting "high expectations" for children with disabilities. *See, e.g.*, 20 U.S.C. § 1400(c)(5)(A) (recognizing that educators should set "high expectations" including preparing children with disabilities "to lead productive and independent lives, to the *maximum* extent possible") (emphasis supplied); § 1414(d)(1)(A)(i)(VIII) (requiring IEPs to assist children with disabilities in transitioning to post-secondary education, employment, and, if possible, independent living).

II. *Amicus* Can Attest: A Standard More Rigorous than the "*Rowley* Standard" Is Working And Practiced Everyday "in the Field."

Consistent with the IDEA's 1997 and 2004 amendments, public school educators across the nation have regularly set high expectations for and provided

meaningful educational benefits to students with disabilities. Decades of research and experience establish that the education of children with disabilities is enhanced by placing high expectations on these children – tailored to their individual abilities and potential – in order to prepare them to be college- and career-ready and to lead productive and independent adult lives. These high expectations are implemented every day in the field through carefully crafted IEPs, drafted with the participation of the parents and child, based on the child's individual needs. In crafting an IEP, educators take into account a child's present level of academic achievement, overall academic performance, and how the child's disability impacts his or her ability to be involved in and make progress in the general education curriculum. 34 C.F.R. § 300.320.

Research has demonstrated that children with disabilities can make significant academic progress related to reading and math when appropriate instruction, services, and support are provided. *See* Letter from U.S. Dep't of Educ., Office of Special Educ. Programs ("OSEP") (Nov. 16, 2015), http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf. Moreover, setting high expectations for students with disabilities correlates positively with academic achievement. *See* Kevin S. McGrew & Jeffrey Evans, *Expectations for Students with Cognitive Disabilities: Is the Cup Half Empty or Half Full? Can the Cup Flow Over?*, NAT'L CENTER ON EDUC. OUTCOMES SYNTHESIS REP. 55 (Dec. 2004), https://nceo.info/Resources/publications/onlinepubs/Synthesis55.html

("[E]xpectancy effects and academic achievement do appear to correlate positively"); *Teacher Expectations: MetLife Survey of the American Teacher: Collaborating for Student Success*, EDUC. WEEK (Mar. 30, 2010), http://www.edweek.org/ew/articles/2010/03/31/27report-3.h29.html. On the other hand, low expectations can result in children with disabilities receiving less challenging instruction and thereby "not learning what they need to succeed" at their grade level. *Id.*[2] *Amicus* strongly believes that the application of high expectations in the field have resulted in meaningful progress for students with disabilities. For example, in 2000, the graduation rate for students with disabilities was approximately 56%. U.S. Dep't of Educ., *OSEP 2002 Annual Report to Congress on the Implementation of the Individuals with Disabilities Act (IDEA)*, Section IV. Results, Figure IV-1, at IV-1-IV-2, https://www2.ed.gov/about/reports/annual/osep/2002/section-iv.pdf. Today, it is 63%, and *Amicus* expects that number to continue to rise in the future. *See* National Center for Education Statistics, Table 1: Public high school four-year adjusted cohort graduation rate (ACGR), by race/ethnicity and selected demographics for the United States, the 50 states, and the District of Columbia: School year 2013-14, http://nces.ed.gov/ccd/tables/ACGR_RE_and_characteristics_2013-14.asp.

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[2] Consistent with the goal of providing appropriate instruction, each child's IEP must include a statement of measurable annual goals designed to meet "the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum." 34 C.F.R. § 300.320(a)(2)(i)(A).

III. A Standard More Meaningful than Just-Above-Trivial Is the Norm Today.

Amicus acknowledges that it must be quite difficult for courts to adjudicate disputes under the IDEA. However, to the extent that courts *must* be involved in adjudicating these disputes, NASDSE has polled its members and, of those who responded, all expressed their belief that a standard more meaningful than just-above-trivial is the norm today. To the extent that the Court intends to define that standard in this case, *Amicus* respectfully requests that the Court carefully considers two important policy priorities. First, any standard should encourage communities to *raise* expectations regarding students with disabilities. We must create an environment where all stakeholders feel empowered to consider how the needs of all students align with, and support, the needs of children with disabilities. Second, any standard should advance the goals reflected in Congress's amendments to the IDEA to ensure that all children with disabilities receive the educational support to prepare for college and post-school integration into their communities.

Amicus does not believe that a child who receives only just-above-trivial educational benefits has received an appropriate education. Consistent with Congress's amendments to the IDEA, we should not accept low expectations for our children with disabilities, just as we would not settle for low expectations for our non-disabled children. *See* U.S. DEP'T OF EDUC., OFFICE OF SPECIAL EDUC. & REHAB. SVCS., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR

FAMILIES 36 (2002). All students, including those with disabilities, should receive an education that ensures that they are held to high academic standards with supports that are appropriate to meet their needs.

In addition, recognizing that our nation's educators aim high *every day in the field* benefits our public schools and neighborhoods as a whole. A school's overall performance can achieve real improvement where students with disabilities are given the resources they need to receive an appropriate and quality education. *See* Paul T. O'Neill, *High Stakes Testing Law and Litigation*, 2003 BYU EDUC. & L. J. 623, 624-25 (2003) (explaining that a school's overall student performance on standardized testing "can . . . have a huge impact on teachers, school, and districts" because it can affect "how much money a school receives"); Michael Metz-Topodas, *Comment: Testing – The Tension between the No Child Left Behind Act and the Individuals with Disabilities Act*, 79 TEMP. L. REV. 1387, 1400 (2006) (explaining that setting high standards for students with disabilities improves their performance on state assessments). By contrast, when students with disabilities are neglected and not challenged, that can reflect negatively on a school's progress as a whole, adversely affecting the school and the community as a whole. *Cf.* Henry M. Levin, *What are the Mechanisms of High-Poverty Disadvantages?: On the Relationship between Poverty and Curriculum*, 85 N.C.L. REV. 1381, 1404 (June 2007) ("The lower expectations for children feed the lower expectations the staff have for themselves. The staff members are often reluctant to try new ideas

because they are afraid that the ideas will not work with 'our children.'").

Finally, setting high expectations for schools empowers state directors of special education and local school district special education directors across the nation to provide services that meet the needs of individual students with disabilities at a level consistent with the IDEA's requirements. Where legal requirements appropriately recognize the need to aim high – but tailor individual expectations to the unique abilities and limitations of individual children with disabilities – more state and local resources can be deployed in service of this goal. For all of these reasons, a more meaningful standard than just-above-trivial is the right standard for children with disabilities, pubic schools, and our member-educators across the country.

Thus, based on our experience every day in the field, our members believe that setting high expectations for students with disabilities is both appropriate under the IDEA and, in fact, *works*. However, *Rowley*'s basic premise, that students with disabilities may have "dramatically" different capabilities, remains true today. 458 U.S. at 202. *See Educating Children with Special Needs*, SPECIAL EDUC. NEWS, Nov. 10, 2016, http://www.specialednews.com/educating-children-with-special-needs.htm ("Special education instructors work with youths and children with a wide range of disabilities."); *cf.* Peter David Blanck, *ADA Study and Commentary: Employment Integration, Economic Opportunity, and the Americans with Disabilities Act: Empirical Study from*

1990-1993, 79 IOWA L. REV. 853, 863 (1994) ("Persons with disabilities encompass a wide range of individuals."). Students' disabilities can range from a significant cognitive disability or autism to a mild to moderate learning disability. *See Educating Children with Special Needs*, *supra*. Because of that broad spectrum of abilities and potential, the proper standard must be sensitive to the individual abilities of each student; due consideration must be accorded at an individualized level to academic, physical, and health needs, among other child-specific characteristics.

For all of these reasons, our members respectfully suggest that any legal standard adopted in this case should take account of what our members are already doing every day "in the field" – namely, applying the requirements enacted by Congress and providing students with educational benefits that are *meaningful* in light of the students' potential and the IDEA's stated purposes.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court consider our experience and observations in its resolution of this case.

Respectfully submitted,

STEPHEN A. MILLER
Counsel of Record
KARA L. KAPP
COZEN O'CONNOR
One Liberty Place
1650 Market Street
Suite 2800
Philadelphia, PA 19103
samiller@cozen.com
(215) 665-4736
Counsel for Amicus Curiae
National Association of State
Directors of Special Education

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BRIEF OF *AMICI CURIAE* NATIONAL CENTER FOR SPECIAL EDUCATION IN CHARTER SCHOOLS AND NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS IN SUPPORT OF PETITIONER

LISA T. SCRUGGS
ERICA FRUITERMAN
DUANE MORRIS LLP
190 South LaSalle Street
Suite 3700
Chicago, IL 60603-3433
(312) 499-6742
LTScruggs@duanemorris.com

WILLIAM P. BETHKE
Counsel of Record
KUTZ & BETHKE LLC
363 S. Harlan Street
Suite 104
Lakewood, CO 80226
(303) 922-2003
wpbethke@lawkb.com

Counsel for Amici Curiae

November 21, 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, National Center for Special Education in Charter Schools ("NCSECS") and National Alliance for Public Charter Schools ("NAPCS") are national nonprofit organizations committed to ensuring that students with disabilities have equal access to public charter schools and that charter schools operate so that all students may succeed. NCSECS and NAPCS support the Petitioner's position that the Tenth Circuit decision should be reversed. *Amici* submit this brief because we find adoption of a higher standard is the most consistent with the charter school movement's emphasis on high expectations for all students and its commitment to serving students with disabilities enrolled in charter schools. NCSECS and NAPCS *Amici* also believe the experience of charter schools, reflected in research, sheds light on the issue before the Court.

Amicus curiae NCSECS is dedicated to ensuring that students with disabilities have equal access to public charter schools and that such schools are designed and operated to enable all students to succeed. NCSECS is based in New York City and was founded in 2013 by long-time special education and school reform advocates, Lauren Morando Rhim and Paul O'Neill.

NCSECS is the first organization to focus solely on working with states, charter authorizers, special

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[1] Pursuant to SUP. CT. R. 37.3(a), *Amici* certify that both parties have consented to the filing of this amicus brief. Pursuant to SUP. CT. R. 37.6, *Amici* certify that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than *Amici* or their counsel made such a monetary contribution.

education advocates, and charter school organizations to improve access and create dynamic learning opportunities for students with disabilities in charter schools. Despite the rapid growth of charter schools—the first charter school opened its doors in 1992 and enrollment now exceeds 2.5 million students in over 6,700 charter schools across the U.S.—criticism persists about equal access and robust services for the roughly 250,000 students with disabilities in charter schools.[2] In order to ensure that more students with learning differences succeed in charter schools, NCSECS conducts research; develops policy papers; brings the special education and charter school communities together; informs federal and state education policy; and undertakes targeted fieldwork.

Amicus Curiae NAPCS is the leading national organization committed to advancing the public charter school movement. NAPCS endeavors to increase the availability of high-quality charter schools as options for families, especially those families without access to high-quality traditional public education. NAPCS has developed model charter school legislation that has influenced statutes and regulations in many states, and supports research, publications, and advocacy furthering the charter school movement.

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[2] Lauren M. Rhim, Jessie J. Gumz, & Kelly Henderson, *Key Trends in Special Education in Charter Schools: A Secondary Analysis of the Civil Rights Data Collection 2011-2012*. National Center for Special Education in Charter Schools (2015), (accessed 11/6/2016); https://static1.squarespace.com/static/52feb326e4b069fc72abb0c8/t/567b0a3640667a31534e9152/1450904118101/crdc_full.pdf (accessed 11/6/2016).

SUMMARY OF ARGUMENT

Amici support reversal of the Tenth Circuit's decision here. The standard used by the Tenth Circuit is not aligned with the goal many charter schools have of setting high expectations and serving *all* students, including those with special needs. The charter school experience illustrates that use of the Tenth Circuit standard is not necessary to avoid undue costs. A more demanding standard can instead stimulate greater coordination amongst educational institutions and innovation.

Importantly, there is no evidence to suggest that the meaningful educational benefit standard used by the Third Circuit has resulted in undue costs for the states or that application of a "higher" standard will result in a greater number of IDEA disputes. Through its decision in *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982), ("*Rowley*"), this Court has given states needed tools for containing special education costs. Yet the "just-more-than-trivial-benefit" standard creates an adversarial context that may very well increase certain costs.

The Court should also reject Respondent's request to adopt the barely more than *de minimis* standard because it cannot be squared with a proper interpretation of the *Rowley* standard and its reading of a free appropriate public education ("FAPE").[3] This sanctions a vision of extraordinarily low expectations for students with disabilities and in that regard is

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[3] *See* 20 U.S.C. §§ 1401(9) (definition of FAPE), 1414(a)(1)(A) (state obligation), 1413(a)(1) (local educational agency obligation to meet state obligations).

wholly inconsistent with a fair reading of the Individuals with Disabilities Education Act ("IDEA").[4]

For these reasons, the Court should reverse the Tenth Circuit decision and adopt a more robust standard.

ARGUMENT

I. CHARTER SCHOOLS EXPERIENCE DOES NOT SUPPORT ADOPTING THE JUST-MORE-THAN-TRIVIAL-BENEFIT STANDARD.

The development of public school choice laws and charter schools as public schools of choice has been widespread over the last few decades.[5] Throughout the country, public charter schools welcome students with disabilities and provide them with opportunities to reach their educational goals. In states where charter schools operate as part of a public school choice system, families can extend their school options beyond a single, geographically-zoned public school and choose a school from among a variety of schools with different approaches to education. In these communities, parents of students with disabilities can select among a range of educational methodologies—Core Knowledge, Montessori, Direct Instruction, Expeditionary Learning, "No Excuses" education, Multiple Intelligences approaches, and many others—to find a school that will advance their child's educational progress.

Charters may attract students with disabilities due to the school's curricular focus, educational program

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[4] 20 U.S.C. §§ 1401-1487.

[5] Forty-three states and the District of Columbia now have charter school laws. *See*, e.g., http://dashboard.publiccharters.org/Home/?p=Home#state (accessed 10/21/2016).

or a structure believed to benefit certain students (often those with mild/moderate disabilities). Other charters implement a whole-school design that is aimed at effectively addressing the specific needs students with disabilities have. In addition, other innovative charter schools specifically develop special education programs designed for students with more significant, even severe-to-profound, disabilities.[6] Regardless of type, by meeting the needs of students with disabilities through the school design itself, many public charter schools can reduce the need for specialized interventions and supports. When run well, these schools can provide high quality *special* education options.[7]

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[6] *See* Lauren M. Rhim, Jessie J. Gumz, & Kelly Henderson, *Key Trends in Special Education in Charter Schools: A Secondary Analysis of the Civil Rights Data Collection 2011-2012*. (2015), https://static1.squarespace.com/static/52feb326e4b069fc72abb0c8/t/567b0a3640667a31534e9152/1450904118101/crdc_full.pdf (accessed 11/6/2016); Lauren M. Rhim, Dana Brinson, & Joanne Jacobs, *Case Studies of Charter Innovation and Success* in Robin Lake, ed., UNIQUE SCHOOLS SERVING UNIQUE STUDENTS: CHARTER SCHOOLS AND CHILDREN WITH SPECIAL NEEDS (2010).

[7] A Massachusetts Institute of Technology study found students with disabilities in Boston charter schools to be outperforming comparable students in traditional public schools. Elizabeth Setren, SPECIAL EDUCATION AND ENGLISH LANGUAGE LEARNER STUDENTS IN BOSTON CHARTER SCHOOLS: IMPACT AND CLASSIFICATION (2015) ("Charter attendance boosts achievement similarly for special needs and non-special needs students. Charters also increase the likelihood that special needs students meet high school graduation requirements and earn a state merit scholarship. Even the most disadvantaged special needs students benefit from charter attendance.") (abstract), https://seii.mit.edu/research/study/special-education-and-english-language-learner-students-in-boston-charter-schools-impact-and-classification/ (accessed 10/23/2016). *See also* Center for Research on Educational Outcomes – Stanford University, URBAN CHARTER SCHOOL

Charter schools are founded upon the belief that individual schools should be able to design and deliver a program of instruction that sets high expectations for all of the students it serves and then be held accountable to meet those expectations. As a result, the majority of charter schools embrace an internal ethic (if not a formal commitment to the authorizer that approved their charter) of high expectations for all students. This public charter school ethic and commitment to meet the needs of all students is congruent with a more robust standard. Thus, adoption of the Third Circuit standard is entirely consistent with the charter school practice of giving due consideration to parental choice and working to meet the educational goals for all students.

The "just-more-than-trivial" standard pushed by Respondent, by contrast, is inconsistent with these charter school pillars. Consistent application of Petitioner's proposed standard will benefit students with disabilities in public charter schools for several reasons.

First, as noted above, the standard for FAPE should be aligned with the high expectations embraced as

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STUDY – REPORT ON 41 REGIONS (2015), at 17 ("Black and Hispanic students, students in poverty, English language learners, and students receiving special education services all see stronger growth in urban charters than their matched peers in urban TPS [traditional public schools]."), https://urbancharters.stanford.edu/download/Urban%20Charter%20School%20Study%20Report%20on%2041%20Regions.pdf (accessed 10/31/2016). We hasten to add that new and small charter schools often struggle with the demands of special education—and will likely continue to do so under any standard. Charter schools and school choice are not a panacea. They are policies that can be—and in a significant number of instances have been—articulated to good effect in this field.

foundational by the vast majority of charter schools. A clear standard from this Court will be applied consistently across all of the states in which charter school operate. And such a standard will facilitate the ability of charter schools to maintain a consistent commitment to setting high expectations for all students. Rather than choosing when to hold high expectations for children, all charter schools, like all other public schools, will consistently seek to do so, for all students.

Second, the capacity many charter schools have to best serve their students with disabilities will be enhanced under a standard reflecting higher expectations. In many states charter schools are part of a larger local education agency ("LEA") or school district.[8] The LEA bears the legal responsibility, and in most cases practical responsibility, for compliance with IDEA.[9] For those charter schools that must provide special education to their students based upon the services and/or financial support they receive from the LEA, a higher standard will enable charter schools to call upon the LEA for support.

Third, for those charter schools that serve as their own LEAs or that otherwise assume the responsibility of providing special education under IDEA, a standard reflecting high expectations should enhance existing incentives for charter schools to further innovate in order to best serve students with disabilities. Charter

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[8] *See* 20 U.S.C. § 1401(19)(A) (definition of LEA); C.R.S. § 22-20-103(1) (defining the "administrative unit[s]" responsible for providing special education).

[9] *See* n. 2, above. *See also* 20 U.S.C. § 1413(a)(5) (requiring comparability of service and funding for charter schools within an existing LEA).

schools will be motivated to share resources and spread the costs of serving their students while adhering to IDEA.

Finally, adoption of such a standard will likely prompt school leaders and parents to utilize all available resources to meet students' needs, including access to public charter schools whose educational focus or design may facilitate IDEA compliance. Charter schools can expand the tools a school district has available to fulfill a child's special education needs and reduce the cost and risk of unilateral placement. In so doing, and combined with a clear, more robust standard, placement in charter schools can increase the likelihood that appropriate individual education program ("IEP") goals are set and met, and reduce the likelihood that parents will resort to "due process."[10] The experience of charter schools supports the enhanced expectations expressed in the Third Circuit standard.

II. THE JUST-MORE-THAN-TRIVIAL-BENEFIT STANDARD SHOULD NOT BE ADOPTED BASED UPON CONCERNS WITH UNDUE FINANCIAL BURDEN OR INCREASED LIKELIHOOD OF LITIGATION.

In no case should cost serve as a basis for a school's failure to provide FAPE.[11] Yet, we also acknowledge

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[10] *See* Albert O. Hirschman, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970) (comparing mechanisms of "exit"—such as school choice—with those of "voice"—such as "due process" and litigation).

[11] *Florence Cty. Sch. Dist. Four v. Carter by and through Carter*, 510 U.S. 7, 15 (1993) ("There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the

that a small number of students in special education require very costly services—under any standard this Court adopts. As charter schools are frequently smaller and sometimes newly founded educational institutions, sudden and extraordinary special education costs can present a financial challenge. However, while individual cases may pose challenges, there is no reason to believe that adoption of the just-more-than-trivial-benefit standard will bring decreased costs overall or lower rates of litigation. Such notions are not supported by available data or thoughtful analysis.

A. Application Of The Just-More-Than-Trivial-Benefit Standard Does Not Correlate With Decreased Education Spending.

State education spending data suggests that application of a higher standard does not drive overall increases in spending. Use of the just-more-than-trivial-benefit standard does not necessarily result in lower spending either. Any argument that implementation of a higher standard of educational benefit will dramatically increase costs incorrectly assumes that the failure to reach that standard invariably turns on the dollar amount spent to provide education. Instead, providing meaningful educational benefit may involve successful resolution of disputes over a student's educational needs, result in better use of existing

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child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate. . . .")

resources and spur innovation and employment of a greater variety of approaches to instruction.[12]

Charter schools offer strong evidence that innovation can lead to improved outcomes without unduly increasing cost. Charter schools, on average, operate with about 80% of the funding of traditional public schools.[13] Many of these schools have improved education for the children they serve through use of different educational approaches and without cost serving as the driving force.

In Chart 1, *Amici* compares a cross-section of states from two circuits on each side of the interpretive split at issue in this case. Looking at 2012 education spending data for those states in the Third and Sixth Circuits that operate under the meaningful benefit standard, we see that results are distributed rather evenly across the first, second, third, fourth and fifth quintile of spending on public education. In fact, only

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[12] *See United States v. Virginia*, 518 U.S. 515, 542 (1996) ("Education, to be sure, is not a 'one size fits all' business.").

[13] *See* Meagan Batdorff, Larry Maloney, Jay F. May, Sheree T. Speakman, Patrick J. Wolf, Albert Cheng, CHARTER SCHOOL FUNDING: INEQUALITY EXPANDS (2014), http://www.uaedreform.org/wp-content/uploads/charter-funding-inequity-expands.pdf (accessed 10/23/2016). Journalists and advocates often point to charter school access to private philanthropy as mitigating or overcoming gaps in tax-based funding. The study cited here found a persistent roughly-20% gap in funding from all sources, *including* philanthropic. *Id.*at p. 9 ("Findings for FY11 debunk the myth that charter schools received disproportionate funding from non-public sources, such as philanthropy. . . . Districts recorded more per pupil funding from other non-public sources than did charter schools, $571 to $552 per pupil, respectively.").

one of seven states subject to meaningful benefit standard appeared in the top quintile.[14]

At the same time, education spending data from the Second and Tenth Circuit states, where the just-more-than-trivial-benefit standard is applied, shows that four of the states sit in the *top* quintile for K-12 public education spending. The education funding levels for the remaining five states are spread over the third, fourth and fifth quintile. This data shows that application of the meaningful benefit standard does not correlate with higher education spending. If use of the meaningful benefit standard adds any overall education costs, that effect is small enough to be masked by other factors and is virtually invisible at the level of state per pupil expenditures. Indeed, on its face, the data suggests that the opposite is true; multiple states using the just-more-than-trivial-benefit standard appear to have *higher* spending. However, a more credible conclusion is that special education costs do not drive overall education spending patterns. Instead, they likely reflect significant

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[14] Appendix, Chart A shows state per pupil expenditures in 2012, ranked top to bottom, by quintile, for the seven Third and Sixth Circuit ("meaningful benefit") states and the nine Second and Tenth Circuit ("just-more-than-trivial" benefit) states. States in other circuits are listed by quintile following the chart. Direct data on special education expenditures are, unfortunately, badly dated. *See* Thomas Parrish, Jenifer Harr, Jean Wolman, Jennifer Anthony, Amy Merickel, and Phil Esra, *State Special Education Finance Systems, 1999-2000: Part II: Special Education Revenues and Expenditures* (2004), http://www.csef-air.org/publications/csef/state/statepart2.pdf (accessed 10/31/2016). For a host of reasons, some noted by Parrish, et al., and including changes in spending patterns after 2008, this 1999-2000 data has almost no utility.

regional variations and unique state circumstances that have nothing to do with special education.

Like other educational bodies, particularly small rural school districts, a standard that brings higher expectations may require charter schools to develop new approaches to serving students with disabilities. But charter school policy is also relatively new and, with respect to special education, underdeveloped. Thus, we anticipate the attention given to this Court's decision will create opportunities to encourage state-level policy changes where needed, and increase the use of organizational flexibility and partnerships already permitted under IDEA.[15] Tools to assist the states with this task are available.[16]

B. The Just-More-Than-Trivial-Benefit Standard Is Not Correlated With Lower Risk of Litigation.

The application of the meaningful benefit standard has not correlated with increased litigation. Indeed, available evidence on the rate of IDEA disputes in different jurisdictions does not suggest a relationship with either of the standards for judging FAPE.[17] As

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[15] *See*, e.g., 20 U.S.C. 1411(e)(3) (creation of local risk pools authorized); 1413(e)(4) (authorization for educational services agencies to assume certain LEA obligations).

[16] *Amicus Curiae* NAPCS has developed and refined provisions of its "model law" intended to provide state policy-making bodies with paths for coordinating charter school policy with IDEA obligations. NAPCS, A MODEL LAW FOR SUPPORTING THE GROWTH OF HIGH QUALITY PUBLIC CHARTER SCHOOLS: SECOND EDITION (2016), http://www.publiccharters.org/wp-content/uploads/2016/10/2016ModelCharterSchoolLaw.pdf (accessed 10/27/2016), at pp. 63-66.

[17] Appendix, Chart B (comparing the same circuits examined in relation to cost in n.22 and Chart A for the rate of IDEA filings

with cost, jurisdictions on each side of the doctrinal divide include those with the highest and fewest number of disputes.

While there are certainly cases (and this is likely one) in which the parents' unilateral placement is more expensive than the District's proposed alternative, a case that is not resolved at the IEP meeting, not resolved in administrative "due process," not resolved at trial, not resolved in the circuit court of appeals, and makes its way to this Court is more likely to be an outlier than an exemplar.[18] Indeed, this case only reaches this Court because a split has developed and hardened, 34 years after the decision in *Rowley*, on an issue of law.

But if this Court resolves this matter with a clear restatement of the *Rowley* standard for educational benefit, it is not at all obvious that either of the proposed alternatives entails an inherently greater average cost, a greater range of issues, or some other potential for excessive cost or needless dispute in the run of future cases. Such consequences are unlikely, not least because the level-of-benefit question was never the primary aspect of *Rowley* giving states a reasonable ability to police the cost of special education and the disputatiousness of special education issues.

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per 10,000 students, by rank order). As with cost, this data reflects differences in standards for FAPE poorly or not-at-all.

[18] There is an additional constraint on cost associated with even this case. The parents here, if ultimately successful, are not entitled to be reimbursed what they have spent, but to recovery limited to the "reasonable" cost of the services secured to provide FAPE. *Florence Cty.*, 510 U.S. at 16.

Rowley offered two general cautions to lower courts that bear on cost and dispute resolution.[19] First, *Rowley* instructs that administrative "due process" decisions be given "due weight."[20] When dealing with a split in the circuits, the resulting issue of law defeats the dispute resolution function of giving weight to a trier of fact's findings. Once this Court resolves that split, it is likely that the vast majority of decisions on whether a student has received "meaningful" benefit (for example) will once again revert to being fact-driven and, if disputed, most often resolved at the lowest level.

The very lowest level of the IDEA process, of course, is the IEP meeting. And at IEP meetings the just-more-than-trivial-benefit standard has a perverse effect from both a cost and dispute resolution standpoint. This standard structures a conversation in which public officials trying to work through a difficult IEP are continuously tempted to inform parents about how little the school system is obligated to do for a child. This can be an accurate and even sympathetic restatement of applicable law, but it invariably sets parents' teeth on edge. The meaningful benefit standard more clearly invites, in contrast, a positive discussion of what the school and parents together can do to support a child's education. Neither standard is proof against disputes. But a legal frame of just-above-trivial benefit immediately risks an adversarial conversation. The meaningful benefit standard encourages a more collaborative framework. Given the millions of IEP meetings held every year, consistently

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[19] *See* III(A), below.

[20] *Rowley,* 458 U.S. at 206.

framing discussions in the collaborative terms anticipated by IDEA[21] should reduce and mitigate disputes with resulting avoidance of some costs.

Second, *Rowley* emphasized that courts were not to be in the business of prescribing state educational policy.[22] This concept tips the scales in favor of school authorities whenever they are carrying out reasonable State educational policies in ways otherwise consistent with IDEA. Again, given the split in the circuits at issue here, issues of state policy, if any, have no bearing: the issue is defining FAPE. Once this Court has spoken the field will presumably return to discussion of a unitary standard, with state educational policy coming into play when it is already clear IDEA has been followed.

Given these controls, the Court should not assume that higher overall cost or likelihood of litigation are strongly correlated with either standard argued in this case.

III. THE TENTH CIRCUIT STANDARD FOR FAPE IS INCONSISTENT WITH *ROWLEY*.

The "just-above-trivial" standard, does not correctly interpret *Rowley* and IDEA. Eight years after adoption of IDEA, this Court in Rowley took up its first IDEA case. Among other things Rowley addressed the degree of educational benefit required for students in special education to meet a core requirement of IDEA: the provision of a free appropriate public education. Different interpretations are also reflected in a split in certain

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[21] *See*, e.g., *Rowley*, 458 U.S. at 208-209.

[22] *Rowley*, 458 U.S. at 207-208.

federal courts of appeals—with variations, confusion or inconsistency in other circuits.

This brief is limited to the narrow argument that reversal of the Tenth Circuit decision is warranted. Thus, we will not duplicate the discussion in other briefs of all sources of reinforcement for that conclusion nor of possible further refinement or enhancement of the appropriate standard. *Amici* will here compare those circuits (notably the Third[23]) that have required a meaningful educational benefit (the meaningful benefit standard) and that have a more accurate fix on the meaning of *Rowley* with those circuits (here, the Tenth[24]) that only require educational progress that is just "more than *de minimis*" (the "just-more-than-trivial-benefit standard"). Looking narrowly at that comparison, it is clear that the just-more-than-trivial-benefit standard cannot be squared with *Rowley* itself.

A. Rowley.

The *Rowley* Court reviewed the first grade schooling of Amy Rowley, a student with a hearing impairment. The school district had provided Amy with substantial interventions (focused, in part, on an amplification system). Amy had passed first grade with above-average marks within the conventional grading system. Amy's parents sought the provision of a sign language interpreter for their daughter, contending that this would

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[23] *See Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3rd Cir. 1999) ("significant learning and meaningful benefit . . . gauged in relation to a child's potential").

[24] *See Thompson R20J Sch. Dist. v. Luke P. ex rel Jeff P.*, 540 F.3d 1143, 1149 (10th Cir. 2008)("merely * * * 'more than *de minimis*'" benefit sufficient)(quoting *Urban ex rel Urban v. Jefferson Cty. Sch. Dist. R-1*, 89 F.3d 720. 727 (10th Cir. 1996)).

allow her to more fully realize her academic potential. The Court rejected the suggestion that every student achieving his or her full potential was a credible interpretation of FAPE.[25] It likewise found the concepts of literal "equality" in education and achieving self-sufficiency unhelpful.[26] The Court observed that both "equal" education and achieving self-sufficiency were likely to be too demanding a standard for some students with disabilities and too little for others.[27] Noting the long history of bitter debates in deaf education,[28] the Court declined to become enmeshed in pedagogical issues and found that the substantial interventions tailored to Amy's needs combined with Amy's above-average progress by general education standards constituted offering a free appropriate public education, or FAPE.

Although in *Rowley* the Court carefully "confine[d]" the analysis to a student "receiving substantial specialized instruction and related services . . . who is performing above average in the regular classrooms of

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[25] *Id.*, 458 U.S. at 199 (realization of the full potential of every child with a disability "further than Congress intended to go").

[26] *Rowley*, 458 U.S. at 198-201 & n.23.

[27] *Id.*, 458 U.S. at 198-99, 201 n.23.

[28] *See*, e.g., Oliver Sacks, SEEING VOICES: A JOURNEY INTO THE WORLD OF THE DEAF (1990); Harlan Lane, WHEN THE MIND HEARS: A HISTORY OF THE DEAF (1988) (each recounting over a century of controversy in deaf education). We note that since 1982 advocates of robust use of sign language in deaf education have become critical of interpretation—advocated by the Rowleys as a form of access to sign language—as an instructional methodology. *See*, e.g., Elizabeth A. Winston, *An Interpreted Education: Inclusion or Exclusion?* in Robert Clover Johnson and Oscar P. Cohen, IMPLICATIONS AND COMPLICATIONS FOR DEAF STUDENTS OF THE FULL INCLUSION MOVEMENT, Gallaudet Research Institute Occasional Paper 94-2 (1994).

a public school system,"[29] the *Rowley* discussion has nonetheless been the touchstone for analysis of FAPE in a broad range of cases since 1982. The Court stated the core of its holding this way: "if the child is being educated in regular" education the IEP[30] should be calculated to "enable the child to achieve passing marks and advance from grade to grade."[31] In the course of discussing this holding the Court referred to both "meaningful" and "some" educational progress, giving rise to much discussion in the certiorari papers here.[32] But the Court's conclusion is not stated in these precise terms and is tolerably clear: for Amy Rowley FAPE was provided because she received substantial specialized services and her first grade education was a success. The ultimate outcome of "achiev[ing] passing marks and advanc[ing] from grade to grade" is, after all, intended to be graduation from high school with appropriate preparation for later life. And a student who graduates with the equivalent of traditional As, Bs and Cs—particularly one whose performance can be characterized as "above average"—can reasonably be regarded by objective observers as successful.

B. Applying *Rowley* To A Broad Range of Students.

Extending this analysis to address students whose progress is not well measured through the use of traditional marks, one could restate this part of the holding as requiring a plan anticipating educational progress

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[29] *Rowley*, 458 U.S. at 202.

[30] *See* 20 U.S.C. § 1414(d)(1)(A).

[31] *Rowley*, 458 U.S. at 204.

[32] *Compare Rowley*, 458 U.S. at 192 ("meaningful") *with Id.* at 200 ("some").

that, if achieved, would be regarded as successful advancement of that student, through that portion of their public school career. While this involves making some form of reference to expectations for the student that is, of course, exactly what is done in general education, exactly what the Court did in *Rowley*, and a necessary element of writing an always-future-oriented IEP. Further, *Rowley* rejected both sameness and self-sufficiency as standards because these would define expectations too high for some children *and too low for many others*. This observation—that certain demonstrable achievements could be "too low"—cannot be squared with a just-more-than-trivial-benefit standard. Finally, the Court underscored this very point by qualifying its own holding and cautioning that, for some students, even routinely advancing from grade to grade was not to be taken as "automatically" enough to satisfy FAPE.[33]

Rowley is all-but-synonymous with requiring meaningful educational progress as described by the Third Circuit. More important, *Rowley* is plainly incompatible with requiring just-more-than-trivial progress. To revert to reference to traditional marks, a "D" as opposed to an "F" or a "zero" signifies more than "trivial" progress. Indeed, an "F+"—were such a grade awarded—would signify something non-trivial. After all "+" and "-" are intended to convey a non-trivial message. But one cannot read *Rowley* and believe that a mix of Fs and Ds would have resulted in a ruling that Amy Rowley had enjoyed a free and appropriate public education. The Court's further caution that passing from grade to grade was quite significant but not a guarantor of FAPE makes this point with something approaching

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[33] *Rowley*, 458 U.S. at 203 n. 25.

certainty: real progress, meaningful progress, a plan for education that could be reasonably viewed as successful—not optimal, not the same as everyone else's, but also not just-barely visible—is required.

On this point, an exchange in the certiorari papers here is telling. The Solicitor General proposed that the just-more-than-trivial-benefit standard could be met by providing necessary sensory access for a student with a hearing impairment in a single class, but denying the same service in other classes, precluding virtually all progress in those subjects.[34] This, clearly, would allow more-than-trivial progress (passing one class) yet be absurd—reflecting a practice we believe no district or school would even attempt. The Respondent's retort was that this *reductio ad absurdum* was incorrect because the Americans with Disabilities Act[35] ("ADA") would be violated by such a practice.[36] But the issue here is not whether the ADA—adopted 15 years after IDEA and eight years after *Rowley*—would preclude a ludicrous result, or even if anyone would propose or agree to such an IEP. The issue is whether the core concept of FAPE embedded in IDEA has *internal* integrity or is itself reduced to absurdity by the just-more-than-trivial-benefit standard. That the sophisticated Respondents here resorted to extrinsic sources illustrates that the just-more-than-trivial-benefit standard—unassisted by an ADA-based *deus*

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[34] *Endrew F. v. Douglas County Sch. Dist.*, Brief of the United States as Amicus Curiae at 14-15.

[35] 42 U.S.C. §§ 12101 – 12213.

[36] *Endrew F. v. Douglas County Sch. Dist.*, Supplemental Brief for Respondent at 11.

ex machina—defines FAPE in a manner that lacks internal integrity and is inconsistent with *Rowley*.

C. The Just-More-Than-Trivial-Benefit Standard Is Inconsistent with IDEA.

As this Court recently observed, "in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan."[37] As *Rowley* recognized, IDEA was an ambitious effort to address the educational needs of students unjustifiably excluded from public education.[38] That fundamental purpose is not addressed by just-more-than-trivial progress. Just as this standard is inconsistent with *Rowley*, it is inconsistent with the IEP process itself. Requirements for an IEP include (among other things):

> (II) A statement of measurable annual goals, including academic and functional goals designed to—
>
> (aa) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and. . . .
>
> * * *
>
> (IV) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications

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[37] *King v. Burwell*, 576 U.S. __, ___ (2015), Slip Op. at 21.

[38] *Rowley*, 458 U.S. at 200-204.

> or supports for school personnel that will be provided to enable the child—
>
> (aa) To advance appropriately toward attaining the annual goals;
>
> (bb) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
>
> (cc) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section . . ..[39]

Though these are technically descriptions of process rather than substance, the implications of these details (and others) are palpable and inconsistent with a legislative plan to seek just-more-than-trivial progress. The legislative plan for FAPE as a cornerstone of IDEA was, as this Court plainly recognized in *Rowley,* an expectation that students with disabilities would receive a real education. That expectation is not respected by the just-more-than-trivial-benefit standard.

CONCLUSION

The just-more-than-trivial-benefit standard does not keep faith with *Rowley* or IDEA. Consistent application of a standard reflecting higher expectations will inure to the benefit of students with disabilities in all public charter schools. Moreover, there is no support for the notion that efforts to meet such a standard will radically increase education costs or rates of IDEA

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[39] 20 U.S.C. § 1414(d)(1)(A)(i).

litigation. Rejecting the just-more-than-trivial-benefit standard is consistent with IDEA itself, one of the single most successful school reform efforts in American history.

Respectfully submitted,

LISA T. SCRUGGS
ERICA FRUITERMAN
DUANE MORRIS LLP
190 South LaSalle Street
Suite 3700
Chicago, IL 60603-3433
(312) 499-6742
LTScruggs@duanemorris.com

WILLIAM P. BETHKE
Counsel of Record
KUTZ & BETHKE LLC
363 S. Harlan Street
Suite 104
Lakewood, CO 80226
(303) 922-2003
wpbethke@lawkb.com

Counsel for Amici Curiae

November 21, 2016

APPENDIX

APPENDIX

CHART A: STATE PER PUPIL EXPENDITURES	Just More than Trivial Benefit	Meaningful Benefit
First Quintile	New York (2nd Cir.): $20,610; Connecticut (2nd Cir.): $17.745; Vermont (2nd Cir.): $16,988; Wyoming: $15,797 (10th Cir.).	New Jersey: $17,907 (3rd Cir.).
Second Quintile		Pennsylvania: $13,961 (3rd Cir.); Delaware: $13,938 (3rd Cir.); Ohio: $11,354 (6th Cir.).
Third Quintile	Kansas: $9,972 (10th Cir.).	Michigan: $11,110 (6th Cir).
Fourth Quintile	New Mexico: $9.734 (10th Cir.); Colorado: $8985 (10th Cir.).	Kentucky: $9.312 (6th Cir.).
Fifth Quintile	Oklahoma: $7,729 (10th Cir.); Utah: $6,500 (10th Cir.).	Tennessee: $8630 (6th Cir.).

First quintile: District of Columbia: $18,485; Alaska: $18,416; Massachusetts: $15,087; Rhode Island: $14,767; New Hampshire: $14,335.

Second quintile: Maryland: $14,003; Illinois: $13,077; Maine: $12,707; Hawaii: $12,458; North Dakota: $12,358; Nebraska: $11,726; Minnesota: $11,464.

Third quintile: West Virginia: $11,260; Wisconsin: $11,186; Montana: $11,017; Virginia: $10,973; Louisiana: $10,749; Iowa: $10,668; Washington: $10,202; Oregon: $9,945.

Fourth quintile: Missouri: $9,875; South Carolina: $9,732; Arkansas: $9,616; California: $9,595; Indiana: $9,548; Georgia: $9,202; Alabama: $9,028.

Fifth quintile: South Dakota: $8,881; Florida: $8,755; Texas: $8,593; North Carolina: $8,512; Nevada: $8,414; Mississippi: $8,263; Arizona: $7,528; Idaho: $6,621.

Source: United States Census Bureau, *Public School System Finances* (2014), https://www.census.gov/govs/school/, State Level Tables, Tab 8 (accessed 10/21/2016).

CHART B: RANK ORDER OF JURISDICTIONS BY IDEA FILINGS PER 10,000 STUDENTS, HIGHEST TO LOWEST	Just More than Trivial Benefit	Meaningful Benefit
First Quintile	New York (3) (2nd Cir); Connecticut (9) (2nd Cir).	Virgin Islands (4) (3rd Cir.); New Jersey (7) (3rd Cir).
Second Quintile	Vermont (13) (2nd Cir).	Pennsylvania (11) (3rd Cir.); Delaware (20) (3rd Cir).
Third Quintile	New Mexico (23) (10th Cir.).	Ohio (24) (6th Cir.); Tennessee (27) (6th Cir.).
Fourth Quintile	Kansas (37) (10th Cir.).	Michigan (36) (6th Cir.).
Fifth Quintile	Oklahoma (42) (10th Cir.); Colorado (43) (10th Cir.); Wyoming (47) (10th Cir.); Utah (51) (10th Cir.).	Kentucky (46) (6th Cir.).

First Quintile: District of Columbia (1); Puerto Rico (2); Hawaii (5); California (6); Massachusetts (8); Maryland (10).

Second Quintile: Virginia (12); Alabama (14); Nevada (15); Rhode Island (16); Maine (17); Illinois (18); Washington (19).

Third Quintile: Alaska (21); Texas (22); Missouri (25); Georgia (26); Arizona (28); Florida (29); Virginia (30).

Fourth Quintile: Indiana (31); Mississippi (32)(tie); Idaho (32) (tie); Oregon (34); West Virginia (35); Montana (38); North Carolina (39); Arkansas (40).

Fifth Quintile: Louisiana (41); Minnesota (44); Wisconsin (45); Iowa (48); South Dakota (49); South Carolina (50); Nebraska (52); North Dakota (53).

Source: Perry Zirkel, *Trends in Impartial Hearings Under the IDEA: A Follow-up Analysis,* West's Education Law Reporter, 303, (2014) 1 at 18 App. 3, https://perryzirkel.com/publications/#due (accessed 11/4/2016).

AND
BRIEFS.

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Supreme Court of the United States

ENDREW F., PETITIONER

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR NATIONAL DISABILITY RIGHTS NETWORK, ET AL. AS AMICI CURIAE SUPPORTING PETITIONER

SAMUEL R. BAGENSTOS
625 S. State St.
Ann Arbor, Michigan 48109

ARLENE B. MAYERSON
DISABILITY RIGHTS EDUCATION & DEFENSE FUND, INC.
3075 Adeline St., Ste. 210
Berkeley, California 94703

RONALD M. HAGER
NATIONAL DISABILITY RIGHTS NETWORK
820 1st St., N.E., Ste. 740
Washington, D.C. 20002

MARC A. HEARRON
Counsel of Record
LINDA A. ARNSBARGER
BRYAN J. LEITCH
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-1663
MHearron@mofo.com

Counsel for Amici Curiae

November 21, 2016

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INTEREST OF AMICI CURIAE

Amici curiae are forty-four organizations that are made up of, represent, and advocate for the rights of Americans with disabilities.[1] For decades, amici have been involved in administrative proceedings, litigation, and policy advocacy to promote the civil rights of people with disabilities, including the educational rights of disabled students.

In particular, in the nearly thirty-five years since this Court's decision in *Board of Education v. Rowley*, 458 U.S. 176 (1982), amici have supported a series of legislative changes, in and out of the educational sphere, in which Congress has expanded the civil rights of people with disabilities. The central piece of legislation marking the shift to robust guarantees of disability rights is, of course, the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq.

Congress also adopted a series of amendments to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq.—most notably in 1997 and 2004—which brought that statute in line with the emerging civil rights of people with disabilities. Those amendments strengthened the obligation to provide a free appropriate public education (FAPE) to all children with disabilities. They reject

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[1] No party or counsel for a party authored this brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of this brief. All parties have filed letters with the Clerk granting blanket consent to the filing of amicus briefs.

the notion that, as the Tenth Circuit held, schools can satisfy the statute simply by providing "merely * * * 'more than *de minimis*'" educational benefit to students with disabilities. Pet. App. 16a (citation omitted). The amendments to the IDEA, together with Congress's inclusion of students with disabilities in the national commitment to standards-based education under the Elementary and Secondary Education Act (ESEA), 20 U.S.C. § 6301 et seq., have been part of a comprehensive congressional effort to "[i]nclud[e] individuals with disabilities among people who count in composing 'We the People.'" *Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring).

This is the first case since *Rowley* in which the Court will squarely address the substantive content of a State's obligation under the IDEA to ensure a "free appropriate public education" for students with disabilities. Amici submit this brief to assist the Court in deciding the question presented on the basis of all of the relevant legal developments since its decision in *Rowley*.

Amici curiae are as follows:

The **National Disability Rights Network** (NDRN) is the nonprofit membership association of Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies in the United States. P&A/CAP agencies are authorized under federal law to represent and advocate for, and investigate abuse and neglect of, individuals with disabilities. The P&A/CAP system comprises the Nation's largest provider of legal-based advocacy services for persons with disabilities.

The **Advocacy Institute** was established in 2000 as a not-for-profit organization. In its fifteen years of operation, the Institute has provided close to 100 hours of web-based training for advocates and attorneys working on behalf of children with disabilities and their families, as well as extensive information and resources on many IDEA-related issues.

Advocates for Justice and Education, Inc. (AJE) is the federally designated Parent Training Information Center for the District of Columbia pursuant to 20 U.S.C. § 1482. As its mission, AJE seeks to empower families, youth, and the community to be effective advocates to ensure that children and youth, particularly those who have special needs, receive access to appropriate education and health services.

African Caribbean American Parents of Children with Disabilities, Inc. (AFCAMP) is a federally funded Community Parent Resource Center pursuant to 20 U.S.C. § 1482. Located in Hartford, Connecticut, AFCAMP's mission is to educate, empower, and engage parents and the community to improve quality of life for children with special needs and others at risk of education inequity or system involvement.

The **American Association on Intellectual and Developmental Disabilities** (AAIDD) (formerly named the American Association on Mental Retardation), founded in 1876, is the Nation's oldest and largest organization of professionals in the field of intellectual disability. Through its professional journals, conferences, and book publishing, AAIDD

works diligently to advance scientific understanding of intellectual disability.

The **American Diabetes Association** (Association) is a nationwide, nonprofit, voluntary health organization founded in 1940 made up of persons with diabetes, healthcare professionals who treat persons with diabetes, research scientists, and other concerned individuals. The Association's mission is to prevent and cure diabetes and to improve the lives of all people affected by diabetes.

The **American Foundation for the Blind** (AFB), the Nation's leading nonprofit champion for people with vision loss to which Helen Keller devoted more than four decades of her extraordinary life, advocates for the rights, needs, and independence of children, working-age adults, and seniors who are blind, visually impaired, or deafblind.

The Arc of the United States (The Arc), founded in 1950, is the Nation's largest community-based organization of and for people with intellectual and developmental disabilities (I/DD). Through its legal advocacy and public policy work, The Arc promotes and protects the human and civil rights of people with I/DD and actively supports their full inclusion and participation in the community throughout their lifetimes.

The Arc of Colorado is the Colorado state affiliate of The Arc of the United States and is dedicated

to supporting and advocating for people with I/DD throughout the state of Colorado.

The Arc Michigan is a Michigan organization that has worked for more than sixty years to ensure that people with developmental disabilities are valued in order that they and their families can participate fully in and contribute to their community.

The **Association of University Centers on Disabilities** is a nonprofit membership association of 130 university centers and programs in each of the fifty States and six Territories. AUCD members conduct research, create innovative programs, prepare professionals to serve and support people with disabilities and their families, and disseminate information about best practices in disability programming, including educational instruction from preschool to postsecondary education.

The **Autism Society of America** is the Nation's leading grassroots autism organization. It was founded in 1965 and exists to improve the lives of all affected by autism spectrum disorder (ASD). It does this by increasing public awareness and helping with the day-to-day issues faced by people on the spectrum and their families. Through its strong national network of affiliates, it has been a thought leader on numerous pieces of state and federal legislation.

The **Autistic Self Advocacy Network** (ASAN) is a national, private, nonprofit organization run by and for individuals on the autism spectrum. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities.

The **Center for Public Representation** is a public-interest legal-advocacy organization that has advocated for the rights of and represented people with disabilities for more than forty years. The Center has litigated systemic cases on behalf of people with disabilities in more than twenty States and authored amicus briefs regarding the constitutional and statutory rights of persons with disabilities.

The **Civil Rights Education and Enforcement Center** (CREEC) is a Denver-based national nonprofit membership organization whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability. CREEC promotes this mission through education, outreach, and individual and impact litigation.

Disability Rights California is a nonprofit California organization that protects the human, legal, and service rights of adults and children with disabilities. It is the California agency designated under state and federal law to represent the rights of persons with disabilities.

The **Disability Studies Program of the University of California at Berkeley** works to understand the meaning and effects of disability socially, legally, politically, and culturally. Our research and teaching seek to eliminate barriers to full social inclusion and advance the civil and human rights of people with disabilities.

Easterseals provides opportunities for more than 1.5 million people of all ages with a range of disabilities to achieve their full potential. From child-development centers to physical rehabilitation, job

training, and caregiver support, Easterseals offers assistance to people with disabilities, caregivers, veterans, and seniors through a network of seventy-five affiliates.

The **Education Law Center–PA** (ELC) is a nonprofit legal-advocacy organization dedicated to ensuring that all children in Pennsylvania have access to a quality public education. Through legal representation, impact litigation, trainings, and policy advocacy, ELC advances the rights of vulnerable children, including children with disabilities, children living in poverty, children of color, children in the foster-care and juvenile-justice systems, English-language learners, LGBTQ students, and children experiencing homelessness.

The **Equal Justice Society** (EJS) is a national legal organization focused on restoring constitutional safeguards against discrimination. EJS works to restore the constitutional protections of the Fourteenth Amendment and the Equal Protection Clause, by combining legal advocacy, outreach and coalition building, and education through effective messaging and communication strategies.

Exceptional Children's Assistance Center (ECAC) is North Carolina's federally funded Parent Training and Information Center pursuant to 20 U.S.C. § 1482. ECAC's mission is committed to improving the lives and education of *all* children through a special emphasis on children with disabilities and special healthcare needs.

The **Faculty Coalition for Disability Rights** is a 501c(4) organization advocating for disability rights at the University of California, Berkeley.

With membership drawn from all faculty ranks, the Coalition's mission is to advance the civil rights of people with disabilities on our campus so that they may enjoy full and equal participation in all aspects of the university.

The **Federation for Children with Special Needs** (FCSN) is the federally funded Parent Training and Information Center for Massachusetts. FCSN's mission is to empower and support families and inform and involve professionals and others interested in the healthy development and education of children and youth, with the goal of ensuring that all children and youth, including those with disabilities, receive the services needed to become productive, contributing members of their communities and our society.

The **Learning Disabilities Association of America**, with a membership of over 5,000 individuals with learning disabilities, their families, and educators and researchers, is a consumer-led and -driven organization. Its vision and mission are to have learning disabilities universally understood and effectively addressed, create opportunities for success for all individuals affected by learning disabilities, and reduce the incidence of learning disabilities in future generations.

The **Learning Disabilities Association of Hawai'i** is a nonprofit organization serving children and their families across the Hawaiian Islands, and the U.S.-affiliated Pacific Islands. It is our mission to enhance educational, work, and life opportunities for children and youth with, or at risk of, disabilities by empowering them and their families through

screening, identification, information, training, and mentoring, and by public outreach and advocacy.

The **Long Island Advocacy Center (LIAC)** is a nonprofit organization that represents the legal rights of students and individuals with disabilities. LIAC is familiar with the special education challenges faced by children with disabilities and their families and the teaching approaches proven effective to enable children with disabilities to achieve State-level standards and have the opportunity to graduate high school and go on to college, jobs, and independent living.

Maine Parent Federation's Statewide Parent Information Network (SPIN) is the Parent Training and Information Center, as well as the Family Two Family program for the Health and Rehabilitation Services Administration. It is a nonprofit, grant-funded agency that assists families with children who have special health-care needs to navigate all circumstances they may encounter.

Matrix Parent Network and Resource Center is a Parent Training and Information Center based in Northern California that has provided information, training, and support to families of children with disabilities for more than thirty years.

Mental Health America (MHA), formerly the National Mental Health Association, is a national membership organization composed of individuals with lived experience of mental illnesses and their family members and advocates. The Nation's oldest and leading community-based nonprofit mental health organization, MHA has more than 200 affili-

ates dedicated to improving the mental health of all Americans.

The **National Association of Councils on Developmental Disabilities** (NACDD) is the national nonprofit membership association for the Councils on Developmental Disabilities located in every State and Territory. The Councils are authorized under federal law to engage in advocacy, capacity-building, and systems-change activities that ensure that individuals with developmental disabilities and their families have access to needed community services, individualized supports, and other assistance that promotes self-determination, independence, productivity, and integration and inclusion in community life.

The **National Alliance on Mental Illness** (NAMI) is the Nation's largest grassroots mental-health organization dedicated to building better lives for the millions of Americans affected by mental illness. NAMI advocates for access to services, treatment, support, and research and is steadfast in its commitment to raising awareness and building a community of hope for individuals living with mental illnesses across the lifespan, including students.

The **National Center for Learning Disabilities** (NCLD) is a parent-founded and parent-led nonprofit organization. NCLD's mission is to improve the lives of the one in five children and adults nationwide with learning and attention issues—by empowering parents and young adults and advocating for equal rights and opportunities.

The **National Coalition for Mental Health Recovery** (NCMHR) is a private, nonprofit organiza-

tion comprised of organizations across the country that represent people diagnosed with psychiatric disabilities who are recovering or have recovered from mental-health conditions. NCMHR's mission is to ensure that individuals with psychiatric disabilities have a major voice in the development and implementation of health care, mental health, and social policies at the state and national levels, empowering people to recover and lead a full life in the community.

The **National Council for Independent Living** (NCIL) is America's oldest cross-disability, grassroots organization run by and for people with disabilities. Founded in 1982, NCIL represents thousands of organizations and individuals from every State and Territory, including Centers for Independent Living (CILs), Statewide Independent Living Councils (SILCs), individuals with disabilities, and other organizations that advocate for the rights of people with disabilities throughout the United States.

The **National Council of Jewish Women** (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms.

Founded in 1973, the **National Down Syndrome Congress** is the leading national resource for advocacy, support, and information for anyone touched by or seeking to learn about Down syndrome, from the moment of a prenatal diagnosis through adulthood. A member-sustained, 501(c)(3) organization, repre-

senting the approximately 350,000 people in the United States with Down syndrome and their families, our programs provide individuals with Down syndrome the opportunities and respect they deserve so they can live the life of their choosing.

The **National Federation of the Blind**, a District of Columbia nonprofit corporation, is the oldest and largest membership organization of blind people in the United States, with a membership of over 50,000. Most of the members of the organization are blind people, including many blind children. In addition, we represent a significant population of parents of blind children, some of whom are sighted and some of whom are blind.

Parents Helping Parents (PHP) is a nonprofit, parent-run, family-resource center that has supported families of children with special needs in the Bay Area of California for more than forty years. PHP's mission is to help children and adults with special needs receive the support and services they need to reach their full potential by providing information, training, and resources to build strong families and improve systems of care.

Perkins School for the Blind is a progressive, multi-faceted organization committed to improving the lives of people with blindness and deafblindness all around the world. The Perkins mission is to prepare children and young adults who are blind with the education, confidence, and skills they need to realize their full potential.

Starbridge is one of two federally funded Parent Training and Information Centers in New York State. Starbridge's mission is to partner with people

who have disabilities, their families, and others who support them to realize fulfilling possibilities in education, employment, health, and community living and to transform communities to include everyone.

Statewide Parent Advocacy Network (SPAN) is New Jersey's federally funded Parent Training and Information Center pursuant to 20 U.S.C. § 1482. SPAN's mission is to empower and support families and inform and involve professionals and others interested in the healthy development and education of children and youth, with the goal of ensuring that all children and youth, including those with disabilities, receive the services needed to become productive, contributing members of their communities and our society.

Support for Families is a parent-run nonprofit organization that supports families of children with any kind of disability or special health-care need. Support for Families is familiar with the special education challenges faced by children with disabilities and their families.

Team of Advocates for Special Kids (TASK) is a nonprofit organization that educates and empowers people with disabilities and their families. TASK specializes in special-education support and provide referrals to other agencies when needed. TASK provides information, training, and resources so that parents gain the knowledge and confidence to help themselves and their child.

THRIVE Center is a federally funded Community Parent Resource Center whose mission is to inform and empower all families, particularly low-income and culturally and linguistically diverse fam-

ilies, to be advocates for their children with disabilities, from birth through age twenty-six, and to achieve meaningful participation in their schools and communities.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the nearly thirty-five years since the Court decided *Rowley*, much has changed in the public's—and the law's—understanding of disability. In particular, the passage of the ADA eight years after *Rowley*, along with that statute's subsequent amendments and implementing regulations, have dramatically altered the legal and social status of children and adults with disabilities. No longer are disabled persons "out of sight and out of mind." Congress specifically recognized that people with disabilities should enjoy the right to "fully participate in all aspects of society" and that the law should "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for all disabled people. 42 U.S.C. § 12101(a)(1), (7). As a result of the ADA and other statutes, people with disabilities now ride buses, use the public streets, attend schools and universities, and work in jobs in the mainstream economy. Because education prepares children for future adult roles, educational expectations for disabled children now anticipate higher education, employment, and independent living, rather than a life of dependence and institutionalization.

Since 1990, successive amendments to the IDEA have brought it into line with the post-ADA view of people with disabilities. The IDEA now states that "[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society." 20 U.S.C. § 1400(c)(1). Congress specifically designed the IDEA amendments to "[i]mprov[e] educational results for children with disabilities [as] an essential

element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency." Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17 § 101, 111 Stat. 37, 38 (1997) (new § 601(c)(1)). Over the same period, amendments to the Elementary and Secondary Education Act—amendments that refer to and are referenced by the IDEA—have adopted a model of standards-based education for all students and have specifically included disabled students in that model.

In the decision under review, the Tenth Circuit failed to give due credit to the narrow reach of the *Rowley* decision and failed to consider the changes in the IDEA since the *Rowley* decision. *Rowley* addressed an unusual set of facts, and the Court expressly limited its analysis to those facts. Nothing in the *Rowley* Court's decision purported to adopt a general standard that would apply across the diverse array of fact settings that IDEA cases present. Further, the amendments to the statute since *Rowley* have decisively answered the Court's concern that the IDEA did not set forth a substantive rule governing the education that students with disabilities must receive. Those amendments incorporate the IDEA into the federal statutory policy of standards-based education for all children. They make clear that a school district's educational interventions must seek to enable a child with a disability to meet the standards the district applies to all children, at least absent a specific justification tied to the unique needs of the child. Congress's move to standards-based education, combined with the specific language of the amendments to the IDEA, make the Tenth

Circuit's merely-more-than-*de-minimis* standard untenable.

ARGUMENT

A. *Rowley* Addressed a Narrow, Unusual Fact Setting and Explicitly Declined to Set Forth a Comprehensive FAPE Standard Extending Beyond That Setting

Until the grant of certiorari here, *Rowley* was the only case in which this Court had addressed the substantive content of schools' obligations to provide an "appropriate" education under the IDEA. *Rowley* came before this Court in 1982, just a few years after Congress first required participating States to provide a "free appropriate public education" to disabled children. *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142 § 3(c), 89 Stat. 773, 775 (1975).

Because the *Rowley* decision depended crucially on the facts before the Court, it is appropriate to begin by reviewing those facts. Amy Rowley, an elementary school student, was deaf, though she had "minimal residual hearing and [was] an excellent lipreader." *Rowley*, 458 U.S. at 184. She received her education in the regular classroom along with her nondisabled classmates. *See ibid.* Rowley's parents requested that her school provide a sign-language interpreter for her first-grade class. *See ibid.* But the school district instead gave Rowley "an FM hearing aid which would amplify words spoken into a wireless receiver by the teacher or fellow students during certain classroom activities." *Ibid.* It also pulled her out of class to "receive instruction from a tutor for the deaf for one hour each day and

from a speech therapist for three hours each week." *Ibid.*

The district court found that, even without a sign-language interpreter, Rowley "perform[ed] better than the average child in her class and [was] advancing easily from grade to grade." *Id.* at 185 (internal quotation marks omitted). The Court also found that Rowley was "'a remarkably well-adjusted child' who interact[ed] and communicate[d] well with her classmates and ha[d] 'developed an extraordinary rapport' with her teachers." *Ibid.* (quoting district court's findings).

The facts of *Rowley* were thus distinctive—and not at all representative of the full range of cases to which the IDEA, by its terms, applies. The case involved a high-achieving student who, although not reaching her full potential, was doing better than most of her nondisabled peers—even without the educational interventions that her parents argued were appropriate. The case also involved a dispute regarding what this Court believed to be a broad question of educational policy left to the States: whether oral instruction or sign language was "the best method for educating the deaf, a question long debated among scholars." *Id.* at 207 n.29.[2]

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[2] Under the current version of the IDEA, schools must, "in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode." 20

(Footnote continued on following page)

This Court explicitly tied its decision in *Rowley* to the distinctive facts of the case. The Court recognized that the statute "requires participating States to educate a wide spectrum of handicapped children," who may have a wide range of different abilities and needs for services and supports. *Id.* at 202. It thus expressly declined to "attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Ibid.* Rather, the Court explicitly "confine[d] [its] analysis" to the situation of "a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system." *Ibid.* In that situation, the Court explained, a student's receipt of good marks and advancement from grade to grade is "an important factor" in determining whether the child has received a free appropriate public education. *Id.* at 203. But, the Court emphasized, even that factor was not conclusive:

> We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a "free appropriate public education." In this case, however, we find Amy's academic progress, when considered with the special services and professional consideration

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U.S.C. § 1414(d)(3)(B)(iv). That provision might well alter the result in *Rowley* if the case arose today, though this case does not present that question.

> accorded by the Furnace Woods school administrators, to be dispositive.

Id. at 203 n.25. The *Rowley* Court could hardly have been clearer: Its holding turned on the case's particular facts.

Because of those distinctive facts, the *Rowley* Court phrased most of its key legal statements in the negative. It rejected various maximalist claims regarding the scope of a State's obligations, but it did not embrace any overarching standard for determining what constitutes an "appropriate" education. The Court observed that Congress had not provided a "comprehensive statutory definition of the phrase 'free appropriate public education.'" *Id.* at 190 n.11. The Court said that "[w]hatever Congress meant by an 'appropriate' education, it is clear that it did not mean a potential-maximizing education." *Id.* at 197 n.21; *see also id.* at 200 (rejecting a standard that would have required the State "to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children"). However, the Court also disclaimed any effort to adopt a comprehensive standard for determining when a State had satisfied its obligation to provide a free appropriate public education. *See id.* at 202.

B. Post-*Rowley* Amendments to the IDEA Make Clear That a FAPE Must Provide the Child with the Specialized Instruction and Services Which Allow the Child the Opportunity to Meet the Standards the School District Applies to All Children

In the years since *Rowley*, Congress has not been silent. To the contrary, it has repeatedly amended the IDEA. Where the *Rowley* Court found that Congress had not adopted language providing a "substantive standard prescribing the level of education to be accorded handicapped children," *id.* at 189, the post-*Rowley* amendments have progressively expanded States' substantive obligations under the statute. These amendments make clear that a school district's educational interventions must provide a child with a disability an equal opportunity to meet the standards the district applies to all children. Any deviation from that universal standard must be tied to the unique needs of the child. The Tenth Circuit's merely-more-than-*de-minimis* test therefore falls far short of the requirements that Congress has imposed since *Rowley*.

1. The 1997 amendments

In 1997, fifteen years after *Rowley*, Congress reauthorized the IDEA and made substantial amendments. Many of those amendments focused specifically on enhancing the substantive obligations of school districts to provide a free appropriate public education. Those amendments responded directly to *Rowley* by removing many of the key underpinnings of that decision.

The response to *Rowley* is evident from the new findings Congress added to the text of the IDEA. "Because [they are] included in the [statute's] text," these findings "give[] content to the [statute's] terms." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999). In *Rowley*, the Court had described Congress as having aimed "primarily to make public education available to handicapped children." 458 U.S. at 192. "But in seeking to provide such access to public education," the Court said, "Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful." *Ibid.* The findings included in the 1997 amendments to the IDEA state that the statute had largely succeeded in achieving that "access" goal. Congress found that "[s]ince the enactment and implementation of the Education for All Handicapped Children Act of 1975, this Act has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities." Pub. L. No. 105-17 § 101, 111 Stat. at 39 (new § 601(c)(3)).

But Congress went on to state that the law had not yet achieved its substantive, rather than its access, goals: "However, the implementation of this Act has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." *Ibid.* (new § 601(c)(4)). Congress also emphasized that since the statute's original enactment in 1975, "[o]ver 20 years of research and experience ha[d] demonstrated that the education of children with disabilities can be made more effective

by," among other things: (1) "having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible" and (2) supporting professional development so that teachers can enable children to "meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children" as well as to "be prepared to lead productive, independent, adult lives, to the maximum extent possible." *Ibid.* (new § 601(c)(5)(A), (E)). By using the phrase "maximum extent possible" *three times* in this provision, Congress clearly communicated its rejection of a minimal benefit standard.

Congress's 1997 findings thus added a new focus on ensuring that disabled children would not just have the chance to go to public school, but that they would have an equal opportunity to participate "in the general curriculum to the maximum extent possible." *Ibid.*[3] Congress underscored its new substantive focus—and its emphasis on high expectations—by amending the statement of purposes that appears in the statutory text. As originally enacted in 1975,

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[3] The legislative history of the 1997 amendments further underscores Congress's effort to move from the goal of access "to the next step of providing special education and related services to children with disabilities: to improve and increase their educational achievement." S. Rep. 105-17, at 2-3 (1997). The Senate Report stated that, with the statute's access goals having been largely achieved, "the critical issue now is to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education." *Id.* at 3.

the statute provided that "the purpose of this Act" was "to assure that all handicapped children have available to them * * * a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." Pub. L. No. 94-142 § 3(c), 89 Stat. at 775. The 1997 amendments described the statute's purpose in more robust terms, as aiming "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs *and prepare them for employment and independent living*." Pub. L. No. 105-17 § 101, 111 Stat. at 42 (new § 601(d)(1)(A)) (emphasis added).

The 1997 amendments were not limited to changing the statute's findings and purposes. Congress also made significant changes to the IDEA's operative provisions. These changes, too, responded directly to *Rowley*. Although Congress did not substantively alter the statutory provision that defines "free appropriate public education," *see id.* § 101, 111 Stat. at 44 (new § 602(8)), it made significant changes to the key component of the FAPE definition—the statute's requirements regarding the content of an "individualized education program" (IEP). As *Rowley* recognized, 458 U.S. at 181-82, the IEP requirement gives substance to the statutory command to provide a free appropriate public education. That remains true to this day. *See* 20 U.S.C. § 1401(9) ("free appropriate public education" means special education and related services that, *inter alia*, "are provided in conformity with the individualized education program required under section 1414(d) of this title").

At the time the Court decided *Rowley*, the provision describing what schools must include in an IEP spoke in essentially procedural terms:

> (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

Rowley, 458 U.S. at 182 (quoting 20 U.S.C. § 1401(19) (1982)). Based in large part on the limited substantive content of this provision, the Court concluded "that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Id.* at 206.

The 1997 amendments extensively revised the requirements for what must be included in an IEP. These new requirements specifically focused on ensuring that children with disabilities could participate and progress in the general education curriculum. Thus, instead of merely stating that the IEP should describe "the extent to which" the child "will be able to participate in regular educational programs"—as the former provision did—the new

provision affirmatively required the IEP to provide goals for "meeting the child's needs that result from the child's disability to enable the child *to be involved in and progress in the general curriculum.*" Pub. L. No. 105-17 § 101, 111 Stat. at 84 (new § 614(d)(1)(A)(ii)(I)) (emphasis added). The new provision also required the IEP to set forth "the special education and related services," "supplementary aids and services," and "program modifications or supports" that the school would provide to enable the child "to be involved and progress in the general curriculum." *Ibid.* (new § 614(d)(1)(A)(iii)(II)). Finally, the new provision required that the annual review of a child's IEP "revise[] the IEP as appropriate to address," among other things, "any lack of expected progress toward the annual goals and in the general curriculum." *Id.* § 101, 111 Stat. at 87 (new § 614(d)(4)(A)(ii)(I)).

These changes to the required IEP contents reflect an equal-opportunity approach consistent with the developments in disability law since *Rowley*.[4] The objective is to remove barriers and provide individualized services and supports that enable the student not only to access but to achieve in the general curriculum. And these *substantive* changes mesh perfectly with, and add a layer of content to, the statute's requirements for the IEP *process*. The 1997

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[4] For "an overview of Federal civil rights laws that ensure equal opportunity for people with disabilities," *see* Disability Rights Section, U.S. Dep't of Justice, A Guide to Disability Rights Laws (July 2009), available at https://www.ada.gov/cguide.htm.

amendments set forth the steps involved in this process, starting with comprehensive assessments in all areas of suspected disability, a review of present levels, development of specific goals and services, an examination of any barriers to participation, and an evidence-based system for the evaluation of progress. *See* Pub. L. No. 105-17 § 101, 111 Stat. at 83-85 (new § 614(d)). (The current version of these provisions appears at 20 U.S.C. § 1414(d).) If the IEP services and adaptations are delivered with fidelity, the student has an equal opportunity to achieve in the general curriculum, as well as in other areas such as functional, social, and communication goals. By setting forth the steps to remove barriers and develop individualized services, the amended IEP provisions address the *Rowley* Court's concern about applying an equal opportunity standard by allowing the team to consider the "myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom." *Rowley*, 458 U.S. at 198.

By focusing on participation—and progress—in the general curriculum, these new statutory provisions highlighted Congress's intent to ensure that children with disabilities would receive the same educational opportunities, and be judged by the same educational standards, as nondisabled children. Another amendment Congress made in 1997 underscores this point. That amendment required states to "establish[] goals for the performance of children with disabilities in the State." Pub. L. No. 105-17 § 101, 111 Stat. at 67 (new § 612(a)(16)). Congress provided that those goals must be "consistent, to the maximum extent appropriate, with other goals and

standards for children established by the State." *Id.* (new § 612(a)(16)(A)(ii)). Congress also required States to include children with disabilities in the same "general State and district-wide assessment programs" as nondisabled students, "with appropriate accommodations, where necessary." *Id.* (new § 612(a)(17)). Parent-resource centers and parent-training and information centers were created to help children with disabilities "to meet developmental goals and, to the maximum extent possible, those challenging standards that have been established for all children" and "to be prepared to lead productive independent adult lives, to the maximum extent possible." *Id.* (new § 683(a)(1)-(2)).[5]

2. The 2004 amendments aligned special and general education standards and accountability

In 2004, Congress reauthorized the IDEA once again. And once again, it added provisions that emphasized the robust substantive obligations that it intended to impose on States. Congress retained the statutory findings that the law had largely succeeded in achieving its access goal but that implementation had been impeded by low expectations. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446 § 101, 118 Stat. 2647, 2649 (2004) (codified at 20 U.S.C. § 1400(c)(3), (4)). To address the continuing concerns, Congress amended—

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[5] "[C]hallenging standards" was later amended to "challenging academic achievement goals." 20 U.S.C. §§ 1471(b)(1), 1472(a)(1).

and ratcheted up—its prior finding regarding the high expectations schools should entertain.

Congress now declared that "[a]lmost 30 years of research and experience ha[d] demonstrated that the education of children with disabilities can be made more effective by," among other things, "having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to" meet, "to the maximum extent possible, the challenging expectations that have been established for all children," as well as to "be prepared to lead productive and independent adult lives, to the maximum extent possible." *Ibid.* (codified at 20 U.S.C. § 1400(c)(5)(A)). The use of the words "maximum extent possible" defies a "more than *de minimus*" standard. Congress also found that the education of children with disabilities would be more effective if implementation of the IDEA were "coordinat[ed]" with more general "school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965." *Ibid.* (codified at 20 U.S.C. § 1400(c)(5)(C)). By including children with disabilities in those broader efforts, Congress found, States can "ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent." *Ibid.* To advance this objective, Congress amended the statutory purposes to provide that the free appropriate public education should be designed to prepare students with disabilities "for further education, employment, and independent living." *Id.* § 101, 118 Stat. at 2651 (codified at 20 U.S.C. § 1400(d)(1)(A)).

The Senate Report on the 2004 amendments underscored these findings. The report emphasized that the original IDEA's access goal had largely been achieved: "Today the school house door is open." S. Rep. No. 108-185, at 6 (2003). Thus, the committee explained that its "focus during this reauthorization is on the quality of education children are receiving under the law." *Ibid.* The purpose of the amendments, the committee declared, was "to improve educational results for children with disabilities by * * * [p]roviding a performance-driven framework for accountability." *Id.* at 5.

In their operative provisions, too, the 2004 amendments emphasized that children with disabilities should, to the extent possible, receive the same educational opportunities, and be judged by the same educational standards, as nondisabled children.[6] The amendments required that "[s]tate rules, regulations, and policies * * * support and facilitate local

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[6] These expectations are based on a better understanding of the abilities and potential of students with disabilities. Across the Nation, 8.7% of elementary and secondary students have disabilities. U.S. Dep't of Educ., 38th Annual Report to Congress on the Implementation of the IDEA, Ex. 18 (2016). Of these students, about 90% have the same cognitive abilities as their peers without disabilities and are capable of achieving the same academic standards. Only 7% are classified as intellectually disabled. *Id.* at Ex. 20. And the Centers for Disease Control estimates that only about 38% of students with autism (or 3.2% of students with disabilities) also have intellectual disabilities. Ctrs. for Disease Control & Prevention, Prevalence of Autism Spectrum Disorders (2012). Provided adequate education, many students with intellectual disabilities are going to college, working in the community, and living independently.

educational agency and school-level system improvement designed to enable children with disabilities to meet the challenging State student academic achievement standards." Pub. L. No. 108-446 § 101, 118 Stat. at 2661 (amended § 608(b), codified at 20 U.S.C. § 1407(b)). States are required to establish a "goal of providing full educational opportunity to all children with disabilities." *Id.* § 101, 118 Stat. at 2677 (amended § 612(a)(2), codified at 20 U.S.C. § 1412(a)(2)). The amendments required states to ensure that "[a]ll children with disabilities are included in all general State and districtwide assessment programs, including assessments described under section 1111 of the Elementary and Secondary Education Act of 1965, with appropriate accommodations and alternate assessments where necessary and as indicated in their respective individualized education programs." *Id.* (amended § 612(a)(16)(A), codified at 20 U.S.C. § 1412(a)(16)(A)). The amendments required that any alternate assessments for students with disabilities be "aligned with the State's challenging academic content standards and challenging student academic achievement standards." *Id.* § 101, 118 Stat. at 2687 (codified at 20 U.S.C. § 1412(a)(16)(C)(ii)(I)). In addition, they provided that "if the State has adopted alternate academic achievement standards permitted under the regulations promulgated to carry out section 1111(b)(1) of the Elementary and Secondary Education Act of 1965," the alternate assessments must "measure the achievement of children with disabilities against those standards." *Ibid.* (codified at 20 U.S.C. § 1412(a)(16)(C)(ii)(II)).

At the time Congress adopted the 2004 IDEA amendments, the then-current version of the ESEA was the No Child Left Behind Act of 2001 (NCLB), Pub. L. No. 107-110, 115 Stat. 1425 (2002). Like the IDEA as amended, NCLB also sought to promote equal educational opportunity. Congress described NCLB's purpose as ensuring "that all children have a fair, *equal*, and significant *opportunity* to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments." *Id.* § 101, 115 Stat. at 1439 (adding the then-current version of § 1001) (emphases added). The statute required States to demonstrate that they had "adopted challenging academic content standards and challenging student academic achievement standards," and that those standards would "appl[y] to all schools and children in the State," including disabled students. *Id.* § 101, 115 Stat. at 1444-45 (adding § 1111(b)(1)(A), (B)). To facilitate this goal, it required states to provide for "reasonable adaptations and accommodations for students with disabilities" where that was "necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards." *Id.* § 101, 115 Stat. at 1450-51 (adding § 1111(b)(3)(C)(ix)(II)).

As is evident from the text of the 2004 IDEA amendments, Congress sought in those amendments to "[a]lign[] the IDEA's accountability system with NCLB," an effort Congress thought "essential to ensuring that children with disabilities have the chance to learn and succeed academically." H.R. Rep. No. 108-77, at 83 (2003). The House Report ex-

plained that the "bill carefully aligns the IDEA with the accountability system established under the No Child Left Behind Act to ensure that there is one unified system of accountability for States, local educational agencies, and schools." *Id.* at 96. The report underscored the effort to move beyond the access goal of the original version of the IDEA by emphasizing that the amendments would "enhance[] the IDEA by improving education results for children with disabilities." *Id.* at 130.

In recent amendments to the ESEA, Congress modified the relevant NCLB provisions while retaining their basic structure and the same high academic standards for students with disabilities as for all students. *See* Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1802, 1823 (2015) (codified at 20 U.S.C. § 6311(b)). The ESSA continues to require States to adopt "challenging academic content standards and aligned academic achievement standards" that "apply to all public schools and public school students in the State" and "include the same knowledge, skills, and levels of achievement expected of all public school students in the State." 20 U.S.C. § 6311(b)(1)(A), (B). ESSA also requires that these standards be "aligned with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant State career and technical education standards." *Id.* § 6311(b)(1)(D).

While the statute now permits States, "through a documented and validated standards-setting process," to "adopt alternate academic achievement standards for students with the most significant cognitive disabilities," *id.* § 6311(b)(1)(E)(i), those alter-

nate standards must be "aligned with the challenging State academic content standards," "promote access to the general education curriculum, consistent with the [IDEA]," "reflect professional judgment as to the highest possible standards achievable by such students," be designated in a student's IEP, and be "aligned to ensure that a student who meets the alternate academic achievement standards is on track to pursue postsecondary education or employment, consistent with the purposes of" the Rehabilitation Act. *Ibid.*

The ESSA specifically amended the IDEA to incorporate these new provisions, thus establishing expectations for state academic standards that are significantly more challenging than prior law. *See id.* § 1412(a)(16)(C). Indeed, ESSA's amendments to IDEA added numerous references to students with disabilities meeting "challenging academic achievement goals that have been established for all children." *E.g., id.* §§ 1454(a)(1)(B), 1454(b)(1)(B)-(C), 1464(b)(2)(A), 1470, 1472(b)(1), 1472(a)(1).

The ESSA also permits a state to "provide for alternate assessments aligned with the challenging State academic standards and alternate academic achievement standards" for "students with the most significant cognitive disabilities," but no more than one percent of the students in the State may receive these alternate assessments. *Id.* § 6311(b)(2)(D)(i), (i)(I). States may provide for these alternate assessments if the State "promotes, *consistent with the Individuals with Disabilities Education Act* * * *, the involvement and progress of students with the most significant cognitive disabilities in the general education curriculum." *Id.* § 6311(b)(2)(D)(i)(III) (em-

phasis added). And the State cannot "preclude a student with the most significant cognitive disabilities who takes an alternate assessment based on alternate academic achievement standards from attempting to complete the requirements for a regular high school diploma." *Id.* § 6311(b)(2)(D)(i)(VII).

After the 1997 and 2004 IDEA amendments, and the amendments to the ESEA that they incorporated by reference, it can no longer be said that the IDEA lacks a "substantive standard prescribing the level of education to be accorded handicapped children." *Rowley*, 458 U.S. at 189. As it has been amended, the IDEA requires States to seek to ensure that children with disabilities have an equal opportunity to "be involved in and make progress in the general education curriculum," *id.* § 1414(d)(1)(A)(i)(II)(aa), and that they can meet the "challenging State academic content standards" applied to all students in the state, *id.* § 1412(a)(16)(C)(ii)(I). Although the statute's current provisions contemplate that some disabled students may need to have proficiency measured using alternate academic achievement standards, the States must promote the involvement and progress of students with the most significant cognitive disabilities in the general education curriculum. *See id.* § 6311(b)(2)(D)(i)(III). These robust substantive requirements instantiate the "high expectations" for disabled children that Congress demanded. *Id.* § 1400(c)(5)(A). They also directly conflict with the minimal "more than *de minimis*" standard applied by the Tenth Circuit.

3. The Department of Education's interpretation

The Department of Education, which administers the IDEA, *see id.* § 1402(a), has adopted regulations that endorse this understanding of the statute's substantive standards. Because the Department has been granted express regulatory authority, *see id.* § 1406, these regulations are entitled to deference. *See City of Arlington v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891-92 (1984).

The Department has repeatedly recognized that Congress's successive enactments have expanded schools' obligations. When it adopted new IDEA regulations in 1999, the Department specifically noted that "the 1997 amendments place greater emphasis on a results-oriented approach related to improving educational results for disabled children than was true under prior law." *Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities*, 64 Fed. Reg. 12,406-01, 12,538 (Mar. 12, 1999). The Department concluded that the IDEA Amendments included "provisions that tie IEP goals and objectives to the regular education curriculum (section 614(d)(1)(A)), establish performance goals and indicators for children with disabilities consistent with those that a State establishes for nondisabled children (section 612(a)(16)), and require the participation of children with disabilities in the same general State and district-wide assessments as nondisabled students (section 612(a)(17))." *Id.* at 12,600-01.

Similarly, when it adopted regulations to implement NCLB, the Department explained that the new statute "sought to correct" the problem of low expectations for disabled students "by requiring each State to develop grade-level academic content and achievement standards that it expects all students—including students with disabilities—to meet, and by holding schools and LEAs responsible for all students meeting those standards." *Title I—Improving the Academic Achievement of the Disadvantaged*, 67 Fed. Reg. 71,710, 71,741 (Dec. 2, 2002). In issuing later NCLB regulations, the Department sought to implement Congressional intent "that schools are held accountable for the educational progress of students with the most significant cognitive disabilities, just as schools are held accountable for the educational results of all other students with disabilities and students without disabilities." *Title I—Improving the Academic Achievement of the Disadvantaged*, 68 Fed. Reg. 68,698, 68,698 (Dec. 9, 2003).

Notably, the Department's regulations specifically incorporate the post-*Rowley* statutory changes into the definition of "special education"—one of the components of the "free appropriate public education" that the IDEA demands that States provide to children with disabilities. *See* 20 U.S.C. § 1401(9). The regulations define "special education" as instruction that, among other things, "adapt[s], as appropriate to the needs of an eligible child," educational "content, methodology, or delivery of instruction," to both "address the unique needs of the child" and "ensure access of the child to the general curriculum, *so that the child can meet the educational standards within*

the jurisdiction of the public agency that apply to all children." 34 C.F.R. § 300.39(b)(3) (emphasis added).

Under the Department's regulations, a school district must aim to ensure that a disabled child has access to the general curriculum and can meet the educational standards that apply to all students. The Department's regulations define "general education curriculum" as "the same curriculum as for nondisabled children." *Id.* § 300.320(a)(1)(i). Indeed, in adopting regulations implementing the 2004 amendments to the IDEA, the Department explained: "As the term 'general education curriculum' is used throughout the Act and in these regulations, the clear implication is that there is an education curriculum that is applicable to all children and that this curriculum is based on the State's academic content standards." *Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities*, 71 Fed. Reg. 46,540-01, 46,579 (Aug. 14, 2006). The Department also emphasized that the ESEA and IDEA are aligned in focusing "on the attainment of State-approved grade-level standards for *all* children." *Id.* at 46,652 (emphasis added). Thus, although aspects of instruction might have to be modified to meet the child's unique needs, the regulations impose a robust substantive requirement on the education that the district must provide to students with disabilities.

As the Department explained its interpretation in 2015, "[r]eading the IDEA and ESEA requirements together, it is incumbent upon States and school districts to ensure that the IEPs of students with disabilities who are being assessed against grade-level academic achievement standards include content and

instruction that gives these students the opportunity to gain the knowledge and skills necessary for them to meet those challenging standards." *Improving the Academic Achievement of the Disadvantaged; Assistance to States for the Education of Children With Disabilities*, 80 Fed. Reg. 50,773-01, 50,780 (Aug. 21, 2015). Later that year, the Department elaborated in a guidance document that "an IEP for a child with a disability, regardless of the nature or severity of the disability," must be "designed to give the child access to the general education curriculum based on a State's academic content standards for the grade in which the child is enrolled" and must "include[] instruction and supports that will prepare the child for success in college and careers." Letter from Michael Yudin, Assistant Sec'y & Melody Musgrove, Dir. of Office of Special Educ. Programs, U.S. Dep't of Educ., Office of Special Educ. & Rehab. Servs. (Nov. 16, 2015), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf. The merely-more-than-*de-minimis* standard applied by the Tenth Circuit is flatly inconsistent with the Department's own interpretation.[7]

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[7] The educational methods and technologies involved in teaching children with even the most significant disabilities have developed over the years alongside the statutory and administrative changes we highlight in this brief. The field has developed a body of evidence-based approaches that can enable the overwhelming majority of students with disabilities to meet challenging state standards. *See generally* Thomas Hehir, New Directions in Special Education (2005).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

SAMUEL R. BAGENSTOS
625 S. State St.
Ann Arbor, Michigan 48109

ARLENE B. MAYERSON
DISABILITY RIGHTS EDUCATION & DEFENSE FUND, INC.
3075 Adeline St., Ste. 210
Berkeley, California 94703

RONALD M. HAGER
NATIONAL DISABILITY RIGHTS NETWORK
820 1st St., N.E., Ste. 740
Washington, D.C. 20002

November 21, 2016

MARC A. HEARRON
Counsel of Record
LINDA A. ARNSBARGER
BRYAN J. LEITCH
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-1663
MHearron@mofo.com

Counsel for Amici Curiae

No. 15-827

IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION, IN SUPPORT OF PETITIONER

ALICE O'BRIEN
(Counsel of Record)
JASON WALTA
LUBNA A. ALAM
AMANDA L. SHAPIRO
National Education Association
1201 16th Street, N.W.
Washington, DC 20036
(202) 822-7035

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

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INTEREST OF *AMICUS CURIAE*

This brief is submitted with the consent of the parties[1] on behalf of the National Education Association (NEA) as *amicus curiae* in support of the Petitioner, Endrew F.

NEA is a nationwide employee organization with approximately three million members, the vast majority of whom serve as educators and education support professionals in our nation's public schools, colleges, and universities. NEA has a strong and longstanding commitment to equal educational opportunity for students with disabilities. The NEA Representative Assembly, NEA's highest governing body, has adopted numerous resolutions to increase the support provided to children with disabilities. For example, NEA Resolution B-34 ("Education for All Students with Disabilities") urges, among other measures, that "[s]tudent placement must be based on individual needs rather than on available space, funding, or local philosophy of a school district." Furthermore, NEA Resolution B-31 ("Alternative Programs for At-Risk and/or Students with Special Needs") "recommends early access to intervening services" that "emphasize a broad range of approaches for addressing students' differing behavioral patterns, interests, needs, cultural backgrounds, and learning styles." As recently as 2016, the NEA Representative Assembly adopted New Business

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[1] Letters of consent from all parties are on file with the Clerk. No counsel for a party authored this brief in whole or in part and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

Item 3 to "bring[] special education reform to the forefront, by collecting . . . the personal stories and experiences of educators, parents, and students to highlight the detrimental impact that inadequate funding and resources ha[ve] on the achievement of students with disabilities in our schools."

INTRODUCTION AND SUMMARY OF ARGUMENT

As an organization that represents millions of educators, including special education teachers and paraeducators, *amicus* understands the gravity of failing to provide students with disabilities an "appropriate education." *Amicus* submits this brief in support of Petitioner, Endrew F., to emphasize that providing students with disabilities the opportunity to succeed academically is a moral and professional obligation of the educator community. This obligation cannot be fulfilled solely through the procedural protections in the Individuals with Disabilities Education Act (IDEA); the IDEA imposes a substantive education obligation that is higher than the slightly-more-than-nothing standard prescribed by the Tenth Circuit Court of Appeals.

First, the Tenth Circuit's standard that an appropriate education must merely provide "some" educational benefit that is more than *de minimis* is contradicted by both educators' and Congress' understanding of the original IDEA, and subsequent amendments thereto. In 1975, educators concluded that an appropriate education was nothing less than one which harnessed disabled students' abilities to their fullest extent. Thereafter, when Congress acknowledged

that the IDEA had successfully achieved *access* to a public education, educators reiterated their commitment to achieve high quality outcomes for all students, including those with disabilities. On this front, educators and Congress were in agreement, and the new IDEA emphasized improving concrete, academic results for students with disabilities. This united focus on improved educational achievement for students with disabilities is irreconcilable with a standard that requires only slightly above the barest educational progress.

Second, aiming for a student with a disability to achieve only "some" progress is contrary to educational best practices. The Tenth Circuit's minimal educational standard is a proclamation to aim low, when best practices dictate that students with disabilities best learn when they aim high. Furthermore, such a standard ignores the necessity of behavioral interventions for students with disabilities, and ignores the diversity of needs and abilities within the disability population itself.

ARGUMENT

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, proclaims that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." *Id.* § 1400(c)(1). To that end, the IDEA requires that public schools that receive federal funds for special education services must provide students with certain disabilities

a "free appropriate public education." 20 U.S.C. §§ 1401(9), 1412(a)(1)(A).

The Tenth Circuit below held that the "free appropriate public education" to which covered students are substantively entitled under the IDEA is provided so long as a student obtains "more than [a] *de minimis*" educational benefit. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. Re-1*, 798 F.3d 1329, 1338–39 (10th Cir. 2015) (citations and quotation marks omitted). In opposing *certiorari*, the Respondent contends that this next-to-*de minimis* standard is adequate to carry out the objectives of the IDEA, in part because individual educators will be "no less dedicated to ensuring that their schools offer supportive and nurturing learning environments for children with disabilities" than they wound be under a more meaningful substantive standard. Resp't's Suppl. Br. Opp'n Cert. at 3.

It is no doubt impossible to overstate the dedication and commitment of our nation's educators to their students—and, in particular, to their students with disabilities. Still, the Respondent's argument is wrong. The Tenth Circuit's standard is incompatible with both the text and purpose of the IDEA, with educators' understanding of those objectives, and with educational practice for students with disabilities.

A. The Tenth Circuit's Standard Is Incompatible with the "Free Appropriate Public Education" that the Text and Purpose of the IDEA Guarantee

The IDEA, through its original enactment and subsequent amendments, makes plain that an "appropriate public education" necessitates more than providing

only "some" educational benefit. Providing students with disabilities with only a modicum of an educational benefit is antithetical not only to Congress' vision of equity and empowerment for students with disabilities, but also to educators' vision of the same.

1. When Congress considered the Education for All Handicapped Children Act (EAHCA) more than four decades ago, it sought to address the concern that many children with disabilities were not receiving an adequate education through the nation's public schools. In particular, Congress found that children with disabilities frequently did not receive "appropriate educational services" and that, in some cases, such students "were excluded entirely from the public school system . . . ." 20 U.S.C. § 1400(c)(2)(A), (B). The schools' shortcomings in educating these students had "long range implications": not only were these students prevented from fulfilling their full capacities, but the missed educational opportunity meant that "public agencies and taxpayers w[ould] spend billions of dollars over the lifetimes of these individuals to maintain [them] as dependents . . . ." S. Rep. No. 94-168, at 9 (1975).

Faced with that stark reality, Congress understood that a federal statute providing for "proper education services" to students with disabilities meant that "many [of these students] would be able to become productive citizens, contributing to society . . . ." *Id.* Educators who supported the EAHCA understood that the very purpose of such federal legislation was to impose a substantive standard as to the type of educational opportunities that must be provided for students with disabilities.

For example, in the 1975 hearings preceding the EAHCA, the Director of the Department of Legislation in the American Federation of Teachers (AFT), and a former teacher himself, testified that "[w]hat we need is to get handicapped children and people full opportunity for *an education to the extent of their ability* and try to get them [to be] self-supporting . . . ." Education for All Handicapped Children Act of 1975: Hearing on S. 6 Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Pub. Welfare, 94th Cong. 329 (1975) (statement of Carl J. Megel, Director of Department of Legislation, American Federation of Teachers, AFL-CIO) (emphasis added). The AFT anticipated that this "legislation . . . would *guarantee* the right of every handicapped child in the United States to *an education to the extent of his capacities* and to the extent possible to prepare him for gainful employment in accordance with his abilities." *Id.* at 332 (emphasis added). The then president of the National Education Association (NEA) expressed a similar hope for the EAHCA's passage, emphasizing the need to develop and disseminate "promising teaching practices" for the benefit of students with disabilities. *Id.* at 351 (statement of James A. Harris, President, National Education Association). Congress espoused the same goals: "The intent [of] S. 6 is to . . . insure that [the EAHCA] . . . will result in maximum benefits to handicapped children and their families." S. Rep. No. 94-168, at 6. This conception of the statute as a mandate to educate children with disabilities "to the extent of [their] capacities" cannot be squared with the notion that any educational benefit, no matter how trivial, is sufficient to comply with the statute.

2. That becomes especially apparent from subsequent amendments to the IDEA in 1997 and 2004. *Compare* Pub. L. No. 94-142, 89 Stat. 773 (1975) (EAHCA) *with* Pub. L. No. 105-17, 111 Stat. 37 (1997) (IDEA 1997 amendments); Pub. L. No. 108-446, 118 Stat. 2647 (2004) (IDEA 2004 amendments). In 1997, Congress found that the IDEA had "successful[ly] . . . ensur[ed] children with disabilities . . . *access* to a free appropriate public education . . . ." Pub L. No. 105-17, § 101, 111 Stat. 37, 39 (codified as amended at 20 U.S.C. § 1400(c)(3)) (emphasis added). But access alone was insufficient in Congress' view. A bipartisan Senate report regarding the 1997 amendments concluded "that the critical issue now is to place greater emphasis on improving student performance and ensuring that children with disabilities receive a *quality* public education." S. Rep. No. 105-17, at 1–3 (1997) (emphasis added); *see also id.* at 3 (discussing how amendments to the IDEA were "needed . . . to improve and increase [the] educational achievement" of children with disabilities); S. Rep. No. 104-275, at 14 (1996) (recognizing that more needed to be done to "improv[e] the quality of services received . . . and transitional results or outcomes obtained by [such] students").

In concrete terms, the 1997 amendments strengthened the requirements for the individual education programs (or IEPs) mandated by the IDEA by, among other things, requiring the inclusion of "measurable" education goals that would be tracked regularly and—as students approached adulthood—a plan for services to enable those students with disabilities to transition to "post-school activities, including post-secondary education, vocational training, integrated employment, . . . continuing and adult education, adult ser-

vices, independent living, or community participation . . . ." Pub. L. No. 105-17, 111 Stat. 37, 46 (1997).

Educators' experiences were critical to this new congressional focus on raising the level of achievement for students with disabilities through the 1997 amendments. In the lead up to the amendment, Congress heard from educational researchers explaining "the restructuring of public education . . . [to] a new paradigm shift . . . [towards a] *quality* [education] for *all* children" that had been embraced by educators. Reauthorization of the Individuals with Disabilities Education Act (IDEA): Hearing Before the Subcomm. on Select Educ. and Civil Rights of the H. Comm. on Educ. and Labor, 103d Cong. 86 (1994) (statement of Dorothy Kerzner Lipsky and Alan Gartner, National Center on Educational Restructuring and Inclusion) (emphasis added).

3. The 2004 amendments to the IDEA furthered this focus on academic achievement by establishing in the Act high expectations for students with disabilities. This renewed focus was due, in part, to testimony from educators on the pressing need to reduce the paperwork required to comply with the IDEA, while simultaneously increasing academic expectations for students with disabilities. *See* Special Education: Is IDEA Working as Congress Intended?: Hearing Before the H. Comm. on Gov't Reform, 107th Cong. 307–08 (2001) (statement of Ed Amundson, Chair, National Education Association's Caucus for Educators of Exceptional Children) ("In effect, educators have made a real commitment and received additional training to teach special needs students; however, they find themselves filling in the boxes . . .

[more than they are] filling in the kids."). In anticipation of the 2004 amendments, educators reiterated their commitment to "providing the best possible education to all students, including those with disabilities." *Id.* at 311.

The 2004 amendments embraced this commitment from educators to "support[] high-quality, intensive preservice preparation and professional development . . . to improve the academic achievement and functional performance of children with disabilities . . . to the maximum extent possible." Pub. L. No. 108-446, § 101, 118 Stat. 2647, 2649–50 (codified as amended at 20 U.S.C. § 1400(c)(5)(E)). In particular, the amendments included congressional findings that education for children with disabilities "can be made more effective" by employing the "improvement efforts" established by the Elementary and Secondary Education Act (ESEA). 20 U.S.C. § 1400(c)(5)(C). To that end, Congress aligned the IDEA's IEP requirements with ESEA's academic standards and testing requirements, thereby requiring that the States' academic expectations for students with disabilities be the same as those for students without disabilities. *Id.* § 1412(a)(16).

4. The Tenth Circuit's more-than-*de minimis* standard simply cannot be reconciled with the text or purpose of the IDEA as it has been outlined here. Ultimately, Congress agreed with educators' predominant view that the IDEA and its amendments must embody a substantive guarantee of an educational benefit. The IDEA seeks to achieve "equality of opportunity" for disabled students, 20 U.S.C. § 1400(c)(1), and is meant to provide disabled children with the

"necessary tools" to "prepare for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A), (3). The Tenth Circuit's minimal view of the educational benefit that must be provided all but ensures that those objectives will never be met for some disabled students.

B. The Tenth Circuit's Standard Is Incompatible with Educational Best Practices.

The Tenth Circuit's standard for an "appropriate education" is also incompatible with the current consensus on best practices for educating students both with and without disabilities. This Court "must consider public education in the light of its full development and its present place in American life throughout the Nation." *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–93 (1954). The "full development" of educational pedagogy emphasizes: maintaining high academic expectations regardless of a student's purported disabilities, differentiating material to be accessible to students at all levels, and creating early behavioral interventions as a necessary component of academic achievement.

1. "Meeting children where they are is essential, but no good teacher simply leaves them there." Nat'l Ass'n for the Educ. of Young Child., *Position Statement: Developmentally Appropriate Practice in Early Childhood Programs Serving Children from Birth through Age 8*, at 10 (2009) ("NAEYC, *Developmentally Appropriate Practice*"), https://www.naeyc.org/files/naeyc/file/positions/position%20statement%20Web.pdf. Even for students in preschool, "having high expectations for all children is

essential." *Id.* at 12. Indeed, teachers' expectations about children's abilities can have either profound or devastating consequences. *See* Ulrich Boser et al., Ctr. for Am. Progress, *The Power of the Pygmalion Effect: Teacher Expectations Strongly Predict College Completion* (2014) ("Boser et al."), https://www.americanprogress.org/issues/education/reports/2014/10/06/96806/the-power-of-the-pygmalion-effect/ (teacher expectations can powerfully predict student achievement); Alix Spiegel, *Teachers' Expectations Can Influence How Students Perform*, NAT'L PUB. RADIO (Sept. 17, 2012, 3:36 AM) ("Spiegel, *Teachers' Expectations*"), http://www.npr.org/sections/health-shots/2012/09/18/161159263/teachers-expectations-can-influence-how-students-perform (finding that when teachers were led to believe a student had a higher IQ, that student's IQ subsequently rose).

For students with disabilities, low expectations create a self-fulfilling prophecy of academic failure, even where special education supports are in place. *See* Laudan Aron & Pamela Loprest, *Disability and the Education System*, 22 FUTURE OF CHILD. 97, 111 (Spring 2012). Setting a standard that is "merely more than *de minimis*" would fix in the IDEA—the primary federal statute aimed at increasing educational access and opportunity for disabled students—low expectations for students with disabilities, despite ample evidence that even the act of conveying high expectations to students creates educational progress. *See* Boser et al., *supra*; Spiegel, *Teachers' Expectations*, *supra*; *see also* Michael Yudin, *Higher Expectations to Better Outcomes for Children with Disabilities*, HOMEROOM: THE OFFICIAL BLOG OF THE U.S. DEP'T OF EDUC. (June 25, 2014), http://blog.ed.gov/2014/06/higher-expectations-

to-better-outcomes-for-children-with-disabilities/ ("Too often, students' educational opportunities are limited by low expectations.").

2. In addition to high expectations, educators agree that differentiating content in order to effectively convey material to students at every level is critical for academic progress. Differentiation means that educators instruct children according to not just what would be appropriate for their grade level, but also as to what would be appropriate for children's "own strengths, needs, and interests[,]" which account for "enormous variation among children of the same chronological age." NAEYC, *Developmentally Appropriate Practice*, *supra*, at 11; *see also* Toni A. Sondergeld & Robert A. Schultz, *Science, Standards, and Differentiation*, 31 GIFTED CHILD TODAY 34, 35 (2008) ("Differentiation provides students with opportunities to approach curriculum from their strengths, as varied as these might be. From this firm footing, limitations can be addressed without developing negative perceptions of self-ability or self-worth."). This method of instruction also is called "scaffolding," which "provid[es] the support or assistance that allows the child to succeed at [a certain] task," and then further allows that child to "go on to use the skill independently in a variety of contexts . . . ." NAEYC, *Developmentally Appropriate Practice*, *supra*, at 15. Scaffolding and differentiation serve to benefit both general education and special education students. *See* Nat'l Educ. Ass'n Educ. Policy & Practice Dep't, *Universal Design for Learning (UDL): Making Learning Accessible and Engaging for All Students (PB23)*, at 1 (2008),

www.nea.org/assets/docs/PB23_UDL08.pdf (discussing Universal Design for Learning, a form of differentiated instruction which was developed for students with disabilities but "is a research-based framework . . . to provide ALL students with equal opportunities to learn") (emphasis in original).[2]

The Tenth Circuit's low standard for educational progress fails to account for varying needs and abilities within the special education population itself. Take, for example, the population of students with a disability who are also gifted, sometimes called "twice-exceptional students."[3] *See* Sarah D. Sparks, *Studies Shed Light on 'Twice Exceptional' Students*, EDUC. WEEK (May 9, 2012) ("Sparks, *'Twice Exceptional' Students*"), http://www.edweek.org/ew/articles/2012/05/08/30gifted.h31.html?tkn=PVWFDRZv62bLKAdNRPRfGOfkavzwUOCHZ0Zw&cmp=ENL-EU-NEWS1. Under the Tenth Circuit's standard, if a gifted and dyslexic child were making "some academic progress" in, for instance, science, but not reading, a court could find that such a child received an appropriate education even if her academic potential indicated that she could make enormous gains across all subject areas beyond her current grade

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[2] The IDEA also encourages the use of universal design in schools. *See* 20 U.S.C. § 1474(b)(2) (awarding grants for activities based on universal design principles).

[3] In 2004, the IDEA for the first time recognized this group's inclusion in the population of students with disabilities. *See* Pub. L. No. 108-446, § 101, 118 Stat. 2647, 2796 (codified as amended at 20 U.S.C. § 1481(d)(3)(J)) (grants should give priority to projects that address "children who are gifted and talented").

level.[4] *Endrew F.*, 798 F.3d at 1342. Satisfying barely-above-the-minimum requirements for such a student has especially far-reaching consequences in early elementary education: "Research continues to confirm the greater efficacy of early action—and in some cases, intensive intervention—as compared with remediation and other 'too little' or 'too late' approaches." NAEYC, *Developmentally Appropriate Practice*, *supra*, at 6; *see also* Sparks, *'Twice Exceptional' Students*, *supra* ("If we . . . neglect the other kinds of skills [that twice-exceptional students] may have a propensity toward, we may actually be shaping the brains of these kids . . . and miss the opportunity to develop other skills they may manifest . . . .") (quoting a social science expert on the topic).

Petitioner's case is telling in this respect, where his academic problems appear to have become more pronounced in second grade, gradually deteriorating from grade to grade thereafter. *See Endrew F.*, 798 F.3d at 1333, 1341 (describing Petitioner's fourth grade as "an especially rocky" year). The Tenth Circuit's standard fails to account for the diversity within the special education population, effectively ig-

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[4] In Petitioner's case, for example, the District Court found it acceptable that some of Petitioner's "objectives carried over from year to year, and [that] some [were] only slightly modified"—essentially permitting Petitioner to fall wholly behind grade-level expectations. *Endrew F. v. Douglas Cty. Sch. Dist. Re-1*, No. 12-cv-2620-LTB, 2014 WL 4548439, at *9 (D. Colo. Sept. 15, 2014), *aff'd*, 798 F.3d 1329 (10th Cir. 2015). Petitioner's actual academic potential became evident when, in his private placement, he had either "mastered . . . the draft IEP objectives" or was on track to master them within two months of his enrollment. *Id.* at *7.

nores best practices to differentiate academic material for students like Petitioner, and would set the bar for the substantive educational benefit required so low as to ensure that IDEA compliance would not need to meet the educational needs of disabled students.[5]

3. Finally, the Tenth Circuit's standard ignores educators' consensus that meaningful academic gains for students who exhibit behavioral and socio-emotional difficulties are nearly impossible without proper interventions and supports—particularly in a child's early years. In ruling against Petitioner, the Tenth Circuit mistakenly concluded that behavioral interventions essentially were not a substantive component of an appropriate education. *See Endrew F.*, 798 F.3d at 1342 n.12. This conclusion exhibits a fundamental misunderstanding of child development. A child's academic needs and her behavioral needs are inseparable. While a child's behavioral problems inevitably cause underachievement, it is now also clear that academic struggles often cause behavioral problems as well, creating a vicious cycle of behavioral and academic lapses. *See* Robert F. Putnam et al., *Academic Achievement and the Implementation of School-Wide Behavior Support*, POSITIVE BEHAV. INTERVENTIONS & SUPPORTS NEWSL.,

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[5] To be sure, many educators and school districts will go far beyond the minimal substantive mandate required. Of course, they will as they have always done so. But that is no argument against setting the substantive standard for the education required by the IDEA at a more than minimal level, any more than would be the argument that there is no need for a higher minimum wage because most employers pay more than the current minimum wage.

VOL. 3:1, at 2 (2016), https://www.pbis.org/Common/Cms/Documents/Newsletter/Volume3%20Issue1.pdf ("As the student's literacy skills do not keep pace with those of peers, academic tasks become more aversive, and problem behaviors that lead to escape from these tasks become more likely."); Lisa Trei, *Academic Performance and Social Behavior in Elementary School Are Connected, New Study Shows*, STAN. NEWS SERV. (Feb. 15, 2006), http://news.stanford.edu/pr/2006/pr-children-021506.html ("Children's social behavior can promote or undermine their learning, and their academic performance may have implications for their social behavior."). Like early interventions for learning disabilities, tackling behavioral problems early in a child's schooling—and continuing such interventions throughout—is critical to her success. *See* NAEYC, *Developmentally Appropriate Practice*, *supra*, at 7 ("Of course, children's social, emotional, and behavioral adjustment is important in its own right, both in and out of the classroom. But it now appears that some variables in these domains also relate to and predict school success."); *see generally* Nat'l Educ. Ass'n Educ. Policy & Practice Dep't, *Positive Behavioral Interventions and Supports: A Multi-tiered Framework that Works for Every Student (PB41A)* (2014), http://www.nea.org/assets/docs/PB41A-Positive_Behavioral_Interventions-Final.pdf.

The Tenth Circuit's standard for an "appropriate education" is so distant from current best practices in both general education and special education curricula as to be an anachronism. The IDEA has recognized the importance of using research-based methods to inform educating students with disabilities; it is important that this Court do so as well. *See* 20 U.S.C.

§ 1400(c)(4) (IDEA "has been impeded by . . . an insufficient focus on applying replicable research on proven methods of teaching and learning for students with disabilities"). The substantive standard of educational benefit required by the IDEA must be set in line with the purpose and structure of the IDEA, and evolving practice as to the most effective manner to reach the IDEA's stated goal of "[i]mproving educational results for children with disabilities" in order to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1).

CONCLUSION

For the foregoing reasons, *amicus* NEA respectfully requests that the ruling below be reversed.

Respectfully submitted,

ALICE O'BRIEN
(*Counsel of Record*)
JASON WALTA
LUBNA A. ALAM
AMANDA L. SHAPIRO
National Education Association
1201 16th Street, N.W.
Washington, DC 20036
(202) 822-7035

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

ENDREW F., A MINOR BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

AMICI CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION, CALIFORNIA SCHOOL BOARDS ASSOCIATION AND ITS EDUCATION LEGAL ALLIANCE, COLORADO ASSOCIATION OF SCHOOL BOARDS, AND HORACE MANN LEAGUE IN SUPPORT OF RESPONDENT

Jonathan P. Read
John W. Norlin
Emily E. Sugrue
Sarah E. Orloff
Fagan Friedman & Fulfrost LLP
1525 Faraday Ave., Suite 300
Carlsbad, CA 92008
(760) 304-6000
jread@f3law.com

Francisco M. Negrón, Jr.
Counsel of Record
National School Boards
1680 Duke Street, FL 2
Alexandria, VA 22314
(703) 838-6722
fnegron@nsba.org

Counsel for Amici Curiae

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QUESTION PRESENTED

What is the level of educational benefit that school districts must confer on children with disabilities to provide a free appropriate public education guaranteed by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*?

INTERESTS OF THE AMICI

Amici Curiae, National School Boards Association (NSBA), California School Boards Association (CSBA) and its Legal Alliance Fund (LAF), Colorado Association of School Boards (CASB), and the Horace Mann League (HML) respectfully submit this brief in support of the Respondent.[1] **NSBA** is a national organization representing state school boards associations and their more than 90,000 local school board members. NSBA believes education is a civil right and that public education is America's most vital institution. NSBA advocates for equity and excellence in public education through school board leadership. **CSBA** is a non-profit, member-supported organization that advocates for and advances the interests of more than 6 million public school students

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[1] All parties have consented to the filing of this brief under Rule 37.3(a). Letters showing such consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to the preparation and submission of this brief.

in the state of California. Nearly all of California's 1,000 school districts and county offices of education are members. The CSBA's **ELA**, composed of approximately 725 CSBA member districts, addresses public education legal issues of statewide concern and seeks to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law and to make appropriate policy decisions for their local agencies. **CASB** represents more than 1000 school board members and superintendents from across the state. Established in 1940, CASB provides the structure through which school board members unite in efforts to promote the interests and welfare of Colorado school districts. **HML** is an organization dedicated to perpetuating the ideals of Horace Mann, the founder of American public school systems, to strengthen the public school system of the United States. It believes that federal grants should be contingent on federal control or interference in the administration, curriculum, personnel, or instructional procedures of local schools.

Amici have a profound interest in this case, because the Court's decision will impact the ability of schools across the nation to address effectively the needs of special education students. *Amici* and their members believe that all children should have equal access to an education that maximizes each student's individual potential. To accomplish this goal, *Amici* seek to offer arguments and information that will help this Court reach a decision that preserves the *Rowley* standard as the means to determine whether public schools have met their obligation to provide a free appropriate public education (FAPE) to children under the IDEA. The *Rowley* standard properly

recognizes and respects Congress' intent to defer to state and local education agencies the task of improving educational outcomes for children. For the reasons explained below, we urge this Court to affirm the decision of the Tenth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

All parties, including *Amici,* care very deeply about children with disabilities and want to ensure that they are provided special education and related services designed to meet their unique needs and to prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d)(1)(A). The parties also must be committed to the IDEA's requirement that children with disabilities are educated in programs that meet state standards and, to the maximum extent appropriate, are educated with children who are not disabled. *Id.* § 1412(a)(5)(A).

Balancing those principles is both art and science. It requires extensive collaboration between a multitude of professionals and active participation of parents to meet each particular child's unique needs. Recognizing this dynamic, Congress deferred to the individualized educational program ("IEP") team to engage in what one court described as the "alchemy of reasonable calculation." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992-93 (1st Cir. 1990). It expressly placed responsibility on the IEP team to determine the desired outcome for each child. Because Congress recognized the importance of tailoring the IEP to the particular needs of each child, it chose not to define statutorily the substantive level

of educational benefit necessary to meet the IDEA's FAPE requirement. From the IDEA's enactment in 1975, and in every reauthorization since then, Congress has not changed this fundamental understanding. Nor should this Court, for to do so would undermine the longstanding, effective IEP process, risking the very individualized education Congress sought to provide for special needs students.

ARGUMENT

I. CONGRESS INTENDED TO DEFER TO STATES AND LOCAL EDUCATIONAL AGENCIES THE ESSENTIAL TASKS OF IMPROVING EDUCATIONAL OUTCOMES FOR STUDENTS.

As this Court acknowledged in *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205-06 (1982), Congress intended from the outset of the IDEA that the essential tasks of improving educational outcomes for students be determined by state and local agencies in collaboration with parents. This intentional deference to local decision making recognized that a collaborative, individualized process is the best way to determine and provide the necessary services to achieve the educational benefit required by FAPE. For this reason, Congress omitted from the IDEA and its predecessor(s) a general substantive standard for the provision of FAPE. *See Id.* at 191-92, 205-06.

In 1975, Congress enacted IDEA's predecessor, the Education for All Handicapped Children Act (EHA), to ensure that students with disabilities

receive access to public schools and FAPE. Pub. L. No. 94-142, 89 Stat. 773. The EHA defined FAPE as:

> Special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet[s] the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 614(a)(5). *Id.* at Stat. 775.

In 1982, this Court, looking to the "elaborate and highly specific procedural safeguards" of the EHA, found it "no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures" as on substantive standards. *Rowley*, 458 U.S. at 205-06. The Court held that the focus on procedural rights and compliance "demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much, if not all, of what Congress wished in the way of substantive content in an IEP." *Id.* However, because "[i]mplicit in the congressional purpose of providing access to a [FAPE] is the requirement that the education to which access is provided be sufficient to confer *some educational benefit* upon the handicapped child," *id.* at 200-01 (emphasis added), the Court found that "[t]his basic

floor of opportunity is *the only substantive standard imposed by the Act*." *Id.* at 191-92 (emphasis added).

The Court recognized that "[t]he primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child." *Id.* at 207. IDEA delegates to IEP teams the authority to develop a student's IEP, make decisions regarding a student's educational program and collectively consider concerns parents have for "enhancing the education of their child." *See* 20 U.S.C. §§ 1412(a)(4), 1414(d)(3)(A)(ii). This framework is elaborate in order to establish the structure most likely to result in beneficial outcomes for disabled children. 458 U.S. at 205-06.

A. By Design the IDEA's IEP Requirements Ensure that Each Child Receives the Educational Benefits Envisioned by Congress Consistent with *Rowley*.

1. The comprehensive and collaborative IEP process is uniquely applied to each disabled child.

For decades IEP teams have collaborated in good faith with parents to design and deliver excellent, successful special education

programs.[2] The procedural requirements ensure this by creating a framework that fosters the development of an IEP that provides educational benefit for each child with a disability. An IEP team's offer of special education and related services flows from a detailed, pedagogical process that begins with a formal, multi-faceted identification of each child's unique needs and does not depend on some amorphous barometer of educational benefit.

The level of educational benefit enjoyed by each child is a product of the IEP process itself and the IEP team's individualized determinations. The IEP process requires the team to connect the dots between detailed procedural components and to tie individualized goals based on specific needs to services reasonably calculated to allow the particular child to meet those goals, to participate to the extent practicable in the general education curriculum, and to participate with non-disabled peers.

Although each procedural requirement in the IEP process is the same for every child, each step is carried out in practice in a complex and targeted manner unique to the needs of each child. With the parents' informed consent, the district conducts a formal evaluation of the child in all areas of suspected disability, 20 U.S.C. §§ 1414(a)(1)(C)(i)(I), 1414(a)(1)(D)(i)(I), using "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information by the parent, that may assist in

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[2] *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62-63 (2005) (Stevens, J., concurring) ("[W]e should presume that public school officials are properly performing their difficult responsibilities under this important statute.").

determining whether the child is a child with a disability; and the content of the [IEP], including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities."[3] *Id.* § 1414(b)(2)(A).

Upon completion of the evaluation, an IEP team meets to review the results, *id.* § 1414(a)(1)(C)(i)(I), along with current classroom-based, local, or state assessments and classroom-based observations, and other observations by the child's teachers and related service providers. *Id.* § 1414(c)(1)(A). The IEP team is uniquely composed for each child and must include the parents, at least one general education teacher, at least one special education teacher, a school district representative, individuals who can interpret the instructional implications of evaluation results, others with knowledge or special expertise regarding the child, and, when appropriate, the child.[4] *Id.* § 1414(d)(1)(B). Beyond these minimum requirements, the composition of the team may vary to include additional experts and resources according to the child's disability and needed services.

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[3] IDEA's procedural safeguards allow parents to obtain an independent educational evaluation at public expense if they disagree with the district's evaluation. 20 U.S.C. §§ 1415(b)(1), 1415(d)(2)(A); 34 C.F.R. § 300.502.

[4] The state educational agency must establish and maintain qualifications to ensure that personnel necessary to carry out IDEA's purposes are appropriately and adequately prepared and trained to serve children with disabilities. 20 U.S.C. § 1412(a)(14)(A).

2. IEPs must set forth a comprehensive educational program tailored to each child's individualized needs.

Based on all the information gathered, the team develops an extensive educational program that must include numerous components specified by the statute to ensure that the child is receiving the services necessary to provide educational benefit on a continuous basis. The IEP must identify the child's present levels of academic achievement and functional performance and must document "how the child's disability affects the child's involvement and progress in the general education curriculum." *Id.* § 1414(d)(1)(A)(i)(I)(aa). The IEP must also enumerate specific annual academic and functional goals designed to meet the child's needs arising from the disability to enable the child to be involved and make progress in the general education curriculum; and meet the child's other needs that result from the disability. *Id.* § 1414(d)(1)(A)(i)(II). For children who take assessments aligned to alternate achievement standards, the IEP must include a description of benchmarks or short-term objectives for each goal.[5] *Id.* § 1414(d)(1)(A)(i)(I)(cc).

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[5] "Benchmarks and short-term objectives allow for regular checks of the child's progress toward achieving the annual goals. The purpose of benchmarks and short-term objectives is to enable a child's teachers, parents, and others involved in developing and implementing the child's IEP to gauge, at intermediate times during the year, how well the child is progressing toward the achievement of the annual goal". Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and

The IEP must also recommend special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, and must include a statement of the program modifications or supports for school personnel designed to allow the child to advance appropriately toward attaining the child's individualized annual goals; to be involved in the general education curriculum; and to be educated and participate with other children both with and without disabilities to the maximum extent appropriate. *Id* § 1414(d)(1)(A)(i)(IV). The IEP may specify special classes, separate schooling, or other removal of the child from the regular educational environment only when the nature or severity of the disability of a child is such that education in regular classes even with the use of supplementary aids and services cannot be achieved satisfactorily. *Id.* § 1412(a)(5)(A).

3. Implementation of the IEP includes progress reporting, ongoing review and periodic re-evaluation.

Following completion of the IEP, the school district must ensure that the specified education and services are delivered in accordance with the plan and must provide parents with "periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance

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Toddlers with Disabilities, 64 Fed. Reg. 12,406, 12,471-72 (Mar. 12, 1999).

of report cards)." *Id.* § 1414(d)(1)(A)(i)(III). The IEP team must reconvene on at least an annual basis to review and update the IEP. *Id.* § 1414(d)(4). The team may reconvene at any time to amend the IEP, including at the request of the parents or other IEP team member, or because of the lack of expected progress. *Id.* §§ 1414(d)(3)(F), 1414(d)(4)(A)(ii)(I). The school district must reevaluate the child at least once every three years, unless the parent and the school district agree that a reevaluation is not necessary. *Id.* § 1414(a)(2)(B)(II).

4. Development of an IEP is a complex and fact specific endeavor not amenable to the application of an artificial national standard.

The IEP process "alchemy" requires a multidisciplinary team working with the parents to gather information from a variety of sources, determine the needs that team values most for a particular child, and account for a myriad of factors to offer an educational program that balances academic benefit, social and emotional development, behavioral concerns, and other needs related to the disability – all while maximizing exposure to peers. The balance is complex and fact-specific, *Poolaw v. Bishop*, 67 F.3d 830, 836 (9th Cir. 1995). Because this balance requires weighing fine points for each child, this task is best left in the hands of the IEP team, *Roland M.*, 910 F.2d at 992-93, unencumbered by an arbitrary and amorphous national standard lacking any sound educational basis for improving educational outcomes for children with disabilities.

To illustrate the degree of complexity and specificity entailed in developing an IEP to serve each child, consider the following scenarios involving two children in the third grade. One is high-functioning and qualifies for special education and related services under the category of specific learning disability (SLD). The other is severely-impacted and qualifies under the category of intellectual disability (ID).

Initially, when the students are in first grade, the school district assesses each student in all areas of suspected disability. A school psychologist assesses the students' cognitive development, auditory and visual processing, attention, executive functioning, social/emotional functioning, and adaptive behavior. A speech/language pathologist assesses the students' receptive, expressive, and pragmatic language, and articulation. A special education teacher assesses the students' academic achievement. An occupational therapist assesses the students' fine and visual motor skills, and sensory perception. All evaluators employ standardized assessment instruments, questionnaires and checklists, and conducted observations.

The initial assessments reveal that both students demonstrate unique needs in the areas of reading fluency and written expression, among other areas. Based on those needs, the IEP team develops for each student an IEP that included individualized goals, growth measurements for each goal and an outline of the placement, special education and related services to support each child's progress on those goals.

Then at the beginning of third grade, each student's IEP team reconvenes to review progress from the previous year and update the IEP for the following year. Each team consists of the parents, the school psychologist, the child's special education teacher, the speech/language pathologist, and the occupational therapist. The teams also include the child's general education teacher and a principal. Each team reviews the student's academic achievement, functional performance throughout the school year, progress in their respective special education programs, and functioning when "mainstreamed" in the general education environment. Following that discussion, each team determines that the student continues to have needs in reading fluency and written expression, among other needs.

The state in which the students reside has adopted the following standards for third graders in those academic areas:

> 1. Reading fluency: Students must read with sufficient accuracy and fluency to support comprehension by reading grade-level prose and poetry orally with accuracy, appropriate rate, and expression on successive readings.
>
> 2. Written expression: Students must write opinion pieces on topics or texts, supporting a point of view with reasons by introducing the topic or text they are writing about, stating an opinion, and creating an organizational structure that lists reasons.

To keep the students' IEPs aligned with those standards, each team drafts annual goals in reading fluency and written expression. For the SLD student, the IEP team drafts the following goals based on comparable standards from the previous grades:

> 1. Reading fluency: By September 1, 2017, [student] will read with sufficient accuracy and fluency to support comprehension by reading a beginning second grade-level text orally with 90 percent accuracy at a rate of 100 words per minute, in two out of three successive readings as measured by teacher charting.
>
> 2. Written expression: By September 1, 2017, [student], when given a graphic organizer, an edit checklist, and modified paper, will write an opinion piece that includes a topic sentence, three supportive facts, and a concluding sentence, with 75 percent accuracy in two out of three trials as measured by work samples.

For the ID student, his IEP team drafts the following goals based on a functional modification of the standards:

> 1. Reading fluency: By September 1, 2017, when given a functional scenario by staff, [student] will identify the appropriate task by selecting a picture,

from a field of three, in five scenarios per minute, in two out of three successive readings as measured by teacher charting.

2. Written expression: By September 1, 2017, [student], when given structured writing materials and a model of his name, will independently copy the letters of his name with 80 percent accuracy in two out of three trials as measured by work samples.

Following the development of goals, each team discusses the least restrictive environment in which to implement those goals. The SLD student's team notes the student's success the previous year when pulled out of class for 45 minutes per day to work with a special education teacher individually on his reading and writing goals. The general education teacher, though, is concerned about the student missing valuable class time and requests that the services be provided within the general education classroom. Consequently, for third grade, the district offers to provide the same amount of special education, albeit incorporated into the general education environment with small group instruction so that the student is not unnecessarily stigmatized within the classroom.

The ID student's team notes the progress that the student made on his functional academic goals in a self-contained classroom with an 8:2 student/adult ratio. However, the parents are not as concerned with their child's academic functioning as much as they are with his exposure to non-disabled peers; they would

like his educational program to focus on his other goals in the areas of social interaction, pragmatic language and behavior. They feel the student would be best served in a general education classroom with a 1:1 aide for the school day. The district determines that although the student might have less opportunity to work on his functional reading and writing goals, he will have more opportunity to interact with non-disabled peers, which may provide greater benefit to his social/emotional development.

This process belies the argument that the *Rowley* standard in concert with the IEP development and implementation lead to trivial substantive benefits. In fact, neither IEP team aims to design a program calculated to provide slightly more than *de minimis* benefit. Instead each team collaborates to determine each child's needs, connect those to measurable goals, weigh the appropriate level of restrictiveness of the child's placement, and sometimes choose progress on certain goals over others—all for the purpose of supporting the child's progress toward the individualized goals adapted from the state education standards.

5. The IEP process under the *Rowley* standard has yielded significant improvement in the education of children with disabilities.

Children with disabilities have experienced considerable academic growth and social participation in the years since Congress first enacted the IDEA. These improvements could not have been achieved if, in fact, children with disabilities have

been receiving only the barest of services to satisfy a "more than *de minimis*" legal standard. More than ever before, they are graduating high school, learning in general education classes, improving academically and enrolling in postsecondary programs. The percentage of students with disabilities graduating high school with a regular high school diploma has increased from 41% in 1993 to 65% in 2013.[6] The percentage of students with disabilities who spend most of the school day (80% or more of time) in general education classrooms has increased from 33% in 1990-91 to 61% in 2013-14.[7] Students with disabilities have, as a whole, improved in reading and math at a rate largely commensurate with general education students.[8] From 1990 to 2005, the number of students with disabilities enrolling in a postsecondary program within four years of finishing high school jumped from 26.3% to 45.6%.[9]

These statistics demonstrate that IEP teams are not basing their recommendations on the goal of meeting a "more than *de minimis*" legal standard. Rather, educators and families, working together, are

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[6] NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 2016 (NCES 2016-144), *available at* http://nces.ed.gov/pubsearch.

[7] *See id.*

[8] NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE NATION'S REPORT CARD: 2015 MATHEMATICS & READING, *available at* http://www.nationsreportcard.gov.

[9] Am. Insts. for Research, Coll. & Career Readiness & Success Ctr., Improving College and Career Readiness for Students with Disabilities 2-3 (Mar. 2013), *available at* http://www.ccrscenter.org/sites/default/files/improving%20college%20and%20career%20readiness%20for%20students%20with%20disabilities.pdf.

creating programs that produce positive outcomes and achieve Congress' vision:

> to assure that all handicapped children have available to them...a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist states and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

Pub. L. No. 94-142, 89 Stat. 775, § 601(c) (1975). As the U.S. Department of Education concluded in 2001, the "IDEA has exceeded President Ford's greatest hopes. Children with disabilities are now being served in public schools alongside their nondisabled brothers, sisters, and friends. And, new opportunities abound." [10]

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[10] U.S. Dep't of Educ. Office of Special Education and Rehabilitative Services, *A New Era: Revitalizing Special Education for Children and Their Families*, at *9 (July 1, 2002), http://ccta center.org/~pdfs/calls/2010/earlypartc/revitalizing_special_education.pdf.

B. A New National "Standard" Would Deprive Students of the Benefits of Individualized Consideration by Shifting the IEP Team's Focus Away from the Fine Points of a Child's Disability to Artificial Legal Constructs.

1. A heightened FAPE standard will interfere with the collaborative IEP process by injecting an unmanageable degree of uncertainty.

The *Rowley* Court's "some" educational benefit standard recognizes and respects Congress's intent to defer to state and local agencies' educational judgments about the services students with disabilities need. At the same time, it provides a safeguard against the continued implementation of programs that are clearly not resulting in educational benefit. In contrast, the new FAPE standards advocated by Petitioner and supporting *amici* would substantially disrupt the collaborative work of IEP teams by shifting their focus from designing appropriate programs to complying with ambiguous legal constraints. For the seven million students currently receiving special education and related services,[11] an IEP team unique to each child engages in thoughtful analysis of each child's individualized

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[11] *See* U.S. Dep't of Educ., 38th Annual Report to Congress on Implementation of the Individuals with Disabilities Education Act, 2016 at xxi-xxiv, *available at* http://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/index.html (retrieved Dec. 17, 2016).

needs, at least once a year. For each team to try to quantify the level of benefit pertaining to those needs necessary to adhere to a new artificial national standard with no clear statutory or regulatory basis or guidance would be beyond impractical. Importantly, at no point since the original enactment of the Act has the U.S. Department of Education issued any implementing regulations or agency guidance requiring an alteration in the meaning of FAPE as explained by this Court's *Rowley* decision, even as the U.S. Government now joins the Petitioner and his *amici* in urging this Court to adopt one of seven different substantive standards. The lack of one definitive standard among these proposals portends the difficulties and confusion IEP teams and courts will likely experience were the Court to depart from *Rowley*.

Petitioner proposes a standard based on "substantially equal opportunity to achieve academic success, attain self-sufficiency and contribute to society," arguing that educators must "set the same kinds of high goals for children with disabilities as they set for their other students."[12] *See* Pet. Br. at 15, 41. Other than the setting of "high goals," the Petitioner offers no suggestions as to how to determine whether the IEP meets the proposed standard. How is a court, much less an IEP team, to determine the appropriate comparative group — is the opportunity offered substantially equal to that

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[12] *See Amici Curiae* Briefs of Advocates for Children of New York, National Disability Rights, and Former Officials of the U.S. Dep't of Educ. (joining Petitioner in arguing that the substantive standard should be "equal opportunity" or "substantially equal opportunity").

offered to non-disabled students in the same grade level? At the same school? Within the district? Within the state? What factors into determining opportunity — access to facilities, level of resources, quality of teachers, availability of special programs? How can an IEP team be certain the opportunity is "substantially" equal?

The National Education Association (NEA) proposes a standard based on "concrete, academic results." Achievement of some particular result is an approach specifically rejected by Petitioner. Pet. Br. at 49-50.

The United States proposes a standard based on "significant educational progress." Recognizing the lack of such definition in the IDEA, the United States turns to *Webster's Dictionary* to assert that the word "meaningful" as used in *Rowley* is synonymous with the word "significant" in its own definition. The United States omits the part of *Webster's* definition that defines "significant" as "a noticeably or measurably large amount." Under either definition, the United States' proposal is rife with ambiguity.

Delaware, Massachusetts, and New Mexico join the 118 Members of Congress to propose a standard based on "meaningful educational benefit," which also appears to be based on a particular result. The only guidance these *amici* propose for analyzing the requisite result is that their proposed standard is not the one that prevails now.

Parent Attorneys and Advocates (PAA) propose an equally vague standard based on compliance "with IDEA's substantive obligations in order to target all areas of a student's educational needs to ensure achievement in the general education curriculum."

PAA does not identify what would serve as a sufficient target, but, like the state and congressional *amici*, appear to advocate for a standard that exceeds the current standard.

Texans with Disabilities propose an altogether different standard that would require, in pertinent part, a determination of whether sufficient modifications, accommodations, and technologies allowed a student to progress in the regular curriculum, at grade level, in spite of the deficits due to disability, while the deficits are being remediated through specialized instruction.[13] That standard appears to be based on a child's ability to perform without a deficit.

Finally, the National Center for Special Education in Charter Schools (NCSECS) proposes a standard that is simply "higher" than "just-more-than-trivial-benefit," without defining or describing the parameters of this "higher" standard.

What the standards proposed by Petitioner and supporting *amici* share is a belief that an educational benefit standard is definable by what it currently is not. Defining a standard in the negative is no standard at all. At best such a standard is vulnerable to multiple interpretations, depriving students of a

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[13] Grade level performance is difficult to define. The use of grade level equivalents in standardized testing has been widely panned by the psychological community. Among other things, it ignores the dispersion that exists in reading level among typical students, which can provide a distorted view of a child's deficit or lack of deficit. For example, an average tenth grader may not perform at precisely a tenth grade reading level on a particular test. *See* Satter, J. M., *Assessment of children: Cognitive applications*, 4th Ed. (2001); Lyman, H. B., *Test Scores and What They Mean*, 6th Ed. (1998).

coherent pedagogical approach to addressing their educational needs. Absent from any of these analyses is a specific measure of the level of benefit which either IEP teams would be required to reasonably calculate or which a child would be required to achieve. Would progress within the limits of each child's disability be sufficient to meet a heightened standard? Would children with disabilities be required to progress at the same pace as their non-disabled peers? Would children with disabilities be required to exceed the rate of progress of non-disabled peers in order to "bridge the gap?" Would such progress be analyzed with deference to the IEP team's decision, albeit based on some higher expectation, or would it be analyzed in hindsight based on judicial review? Such questions would be difficult, if not impossible to answer as part of an ordinary IEP team discussion. The better tack already exists, as the *Rowley* Court recognized: courts should defer to the robust discussions in which IEP teams engage within the logical flow of their procedural commitments, and avoid second guessing the educational decisions that arise out of those discussions unless the procedures are not materially followed or it cannot be reasonably calculated that a child will benefit.[14]

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[14] Since *Rowley*, the application of the "some educational benefit" standard has not resulted in courts merely "rubber stamping" IEPs. *See Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003) (holding IEP not reasonably calculated to provide some educational benefit, in spite of student's progress, where it provided behavior goals without behavior management plan); *see also Bd. of Educ. of Kanawha v. Michael M.*, 95 F. Supp. 2d 600 (S.D. W. Va. 2000) (finding IEP inadequate in spite of goals and objectives that were "reasonably calculated to provide some educational benefit" because the methodology the district used

2. Departing from the current FAPE standard would create the inaccurate perception that IEPs valid under the *Rowley* standard shortchange students with disabilities.

For decades, IEP teams nationwide have been creating IEPs reasonably calculated to provide millions of students with disabilities with educational benefit in the least restrictive environment, while addressing their unique needs with appropriate goals and services, accommodations and modifications. If this Court expands the current FAPE standard, its decision will create a perception among IEP teams, including parents, that the programs *currently* offered to those students are insufficient, subjecting each IEP to the misconstrued requirement of upward revision regardless of its current effectiveness. Such a perception would lead to more confusion between parents and schools as to whether a child is actually receiving FAPE as everyone struggles to apply amorphous standards to real situations. Such uncertainty could create an adverse atmosphere where none existed before and likely would spur a significant increase in the number of due process complaints, pulling already-stretched public

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was not reasonably tailored to accomplish the goals); *Carter v. Florence Cnty. Sch. Dist. Four*, 950 F.2d 156, 159 (4th Cir. 1991), *aff'd* 510 U.S. 7 (1993) (finding IEP goals prescribing "mere four month's progress" and only three periods of individualized instruction per week "ensured the program's inadequacy from the inception.").

resources into litigation and away from the service of children.[15]

If this Court adopts a heightened FAPE standard, it removes the question from the demonstrably capable hands of the IEP team and places it into the realm of courts and administrative hearing officers. It would result in an environment in which the educational benefit sought through the redefined FAPE standard would inure only to parents who have the means and ability to access due process and courts, at the expense of other students with disabilities whose parents do not or cannot litigate. This is contrary to the purpose of the IDEA, which provides great deference and flexibility to IEP teams of *all* children to craft IEPs based on the team's educational expertise and personal knowledge of the individual student's unique needs.

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[15] In 1975, Congress promised to provide federal funds to cover 40% of the cost of educating students with disabilities by 1982. Pub. L. No. 94-142, 89 Stat. 777, § 1401(a)(B)(v) (1975). Federal funding only covered 16.2% of IDEA costs during the 2014 fiscal year. Clare McCann, *IDEA Funding*, EdCentral, http://www.edcentral.org/edcyclopedia/individuals-with-disabilities-education-act-funding-distribution/ (retrieved Dec. 12, 2016).

3. An expansion of the legal standard applied to educational benefit would negatively impact the willingness of IEP teams to place children with disabilities in the least restrictive environment.

"Educating children in the least restrictive environment in which they can receive an appropriate education is one of IDEA's most important substantive requirements." *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10th Cir. 2004); *accord Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995) (recognizing the least restrictive environment mandate as one of the "dual requirements" of IDEA); *Roland M.*, 910 F.2d at 992-93 ("Mainstreaming may not be ignored, even to fulfill substantive educational criteria"); *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 296 (7th Cir. 1988) (providing students with FAPE "must be weighed in tandem" with educating them in the least restrictive environment).

As the hypothetical IEP scenarios above illustrate, IEP teams must weigh their obligations to provide programs designed to allow children with disabilities the opportunity to progress on their goals, participate in the general education curriculum, and interact with their non-disabled peers. In the case of the SLD student, the team had to weigh the proven success of a 1:1 pull-out program with the detrimental effect of the student missing valuable class time –

class time that becomes increasingly crucial in higher grades as the curriculum focuses on substantive material rather than basic skills. In the case of the ID student, the team had to weigh the benefit of direct instruction at the student's functional academic level with what that team believed to be the heightened social and emotional benefit of the general education classroom. In both of these scenarios, an expansion of the legal standard applied to educational benefit could chill a team's willingness to prioritize general education class time, or social/emotional development over academic goals.

Courts have grappled with similar situations. In *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314-15 (9th Cir. 1987), a school district offered a placement that included both general and special education classes. The parents requested a placement that included three hours per day of individual tutoring outside the classroom setting. The IEP team had to balance the student's need to develop higher order intellectual skills with the tutoring program's emphasis on rote skills. *Id.* at 1315. The Ninth Circuit held that the district's offer was appropriately "designed to match the strengths and weaknesses that emerged" from the evaluation data. *See also Fuhrmann ex rel. Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1038 (3d Cir. 1993) (upholding district's placement in public preschool program rather than in private behaviorally-based program for students with autism to address child's major issues of social communication and language function); *Amann v. Stow Sch. System*, 982 F.2d 644, 651 (1st Cir. 1992) (while student's gains in private program might have

been greater, IEP team offered a program that "struck a suitable balance between the goals of mainstreaming and 'maximum potential development.'"); *Scott P.*, 62 F.3d at 535 (IEP in which district proposed placement of blind student in physical support class on comprehensive campus rather than residential school was appropriate, even if not "optimal.").

When an IEP team considers the information available, it may conclude that more than one placement available would provide the student with some educational benefit. Under the current framework, the IEP team balances the potential educational benefits of each program option against the least restrictive environment requirement. The IDEA is satisfied by such balancing, even if the team does not offer the placement that would confer the maximum educational benefit with respect to a particular need. *Amann*, 982 F.2d at 651 ("An IEP 'may not be the *only* appropriate choice, or the choice of certain selected experts, or the child's parents' *first* choice, or even the *best* choice,' yet still provide a free appropriate public education") (citation omitted) (emphasis in original)).

Moving to the heightened FAPE standard that Petitioner propounds would upset the balance between FAPE and least restrictive environment. IEP teams worried about meeting some results-oriented standard would be more likely to focus on relatively short-term annual gains, potentially subverting opportunities for children to develop the skills necessary to "prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A).

II. IMPOSING A NEW FAPE STANDARD WOULD VIOLATE THE SPENDING CLAUSE BY FAILING TO PROVIDE STATE AND LOCAL EDUCATION AGENCIES WITH APPROPRIATE NOTICE OF THE SCOPE OF THEIR OBLIGATIONS UNDER THE IDEA AND THEIR ACQUIESCENCE TO A NATIONAL EDUCATION STANDARD.

This Court should not do from the bench what it has said Congress cannot do by legislation—fail to give appropriate notice to the States about the obligations associated with accepting federal IDEA funding. *See Arlington Cent. Sch. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296-97 (2006); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981). A judicially imposed change in the FAPE standard would have just such an effect where Congress has made no change in the law and would violate the principles of federalism by invading educational policy decisions that belong to states and local governments.

A. Congress Has Provided No Clear Notice that the FAPE Standard Has Been Heightened Beyond the *Rowley* Standard.

The States, through the Spending Clause, accept federal funds in exchange for complying with IDEA, including its definition of FAPE. The statutory definition of FAPE, as interpreted by the Court in

Rowley, has not substantively changed since 1975.[16] This Court has continued to cite to *Rowley* when interpreting IDEA. *E.g., Arlington*, 548 U.S. at 296; *Schaffer*, 546 U.S. at 52-53. There is no reason for this Court to depart now from the *Rowley* standard, because Congress has not changed the statutory provisions at issue in any substantive way.

In *Arlington*, this Court applied *Pennhurst* to find that IDEA's fee-shifting provision did not authorize prevailing parents to recover fees for expert services in IDEA actions, because the relevant statutory provision must be interpreted from the perspective of a state official determining whether to accept the federal funds and the corresponding federal obligations. "In other words, we must ask whether the IDEA furnishes clear notice regarding the liability at issue in this case." *Arlington*, 548 U.S. at 296. This inquiry is even more critical here where the Court is being asked to re-interpret longstanding parameters on the fundamental obligation imposed by the IDEA.

Petitioner and supporting *amici* point to the 1997 and 2004 reauthorizations of IDEA as compelling a change in the *Rowley* standard. But in fact, Congress signaled no intent to change the *Rowley* Court's interpretation of the FAPE standard and declined to craft any such new and unambiguous condition.[17] Certainly, examining the 1997 and 2004 IDEA amendments from the perspective of a state

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[16] In 1997, Congress made a minor grammatical change to the definition of FAPE. *See* Pub. L. No. 105-17, 111 Stat. 37, 44.

[17] Neither has the United States formally in regulation or through informal guidance despite its posture in the instant case.

official, there is no notice of a new or more onerous obligation to provide a different level of FAPE. *See Arlington*, 548 U.S. at 296. Given the lack of any change in the FAPE definition by Congress, state officials and school districts have reasonably continued to rely on the *Rowley* standard.

1. Requiring that IEPs contain measurable annual goals and the participation of students with disabilities in statewide assessments does not evince congressional intent to heighten the FAPE standard.

Petitioner and NEA imply that the 1997 amendments introduced a *new* requirement that IEPs include annual goals, that evidenced Congress' intent to expand the FAPE standard. *See* Pet. Br. at 6-7; NEA Br. at 7. However, the initial enactment of the EHA in 1975 required that IEPs contain "a statement of annual goals, including short-term instructional objectives."[18] The 1997 amendments simply specified that goals should be "measurable."[19]

Petitioner attempts to shore up the case for clear notice of a heightened FAPE standard by pointing to the requirement in the 2004 IDEA reauthorization that students with disabilities participate in the statewide assessments and be included in the accountability standards mandated by the No Child

[18] Pub. L. No. 94-142, 89 Stat. 776 (1975).
[19] Pub. L. No. 105-17, 111 Stat. 37, 84 (1997).

Left Behind Act[20] (the predecessor of Every Student Succeeds Act (ESSA)). 20 U.S.C. § 1412(a)(15)-(16). The congressional findings in the preamble to IDEA 2004 do lament "low expectations" and express the view that educating students with disabilities is "more effective" when there are "high expectations" of them "to the maximum extent possible." *Id.* § 1400(c). Such general legislative findings are inadequate to impose a substantive obligation under the Spending Clause,[21] especially considering that the 2004 amendments contain no provisions aligning IEP requirements with NCLB testing requirements or requiring that IEP goals reflect grade level achievement. Instead, IDEA continues to describe a collaborative process designed to provide children with disabilities special education and related services individually tailored to meet their unique needs.

The primary ways Congress has chosen to encourage "high expectations" for students with disabilities are to require their inclusion in statewide assessments and the disaggregation of their group results on those assessments from those of the general education population. The IDEA, as amended in 2004, requires states (A) "to establish[..] goals for the performance of children with disabilities in the State that ... (iv) are consistent, to the extent appropriate, with any other goals and standards for children established by the State...; and to have performance indicators and annual reports." *Id.* §

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[20] 20 U.S.C. § 6311(b).

[21] *See Arlington*, 548 U.S. at 303 (rejecting an interpretation of attorneys' fees provision based on IDEA findings).

1412(a)(15). Students with disabilities are required to participate in the state assessments "with appropriate accommodations and alternate assessments where necessary and as indicated in their respective individualized education programs..." *Id.* § 1412(a)(16).

Taken together, the state accountability provisions (now expressed in ESSA) and the 2004 amendments to the IDEA do not stand for the proposition that any individual student from a subgroup has an individual entitlement to a particular level of progress. While Congress referenced the state's responsibility under another federal law to establish group outcome standards for students with disabilities (along with other subgroups), it did not change IDEA's *individual* entitlement to an appropriate program developed collaboratively according to the procedural protections of the statute. Congress specifically abjured from creating an entitlement to a certain level of academic progress in IDEA.

2. IDEA amendments adding transition services to IEP requirements fall far short of demonstrating clear notice of Congress' adoption of a heightened FAPE standard.

When Congress introduced transition services in the 1983 amendments, it authorized federal funding for states "to assist in the transitional process to postsecondary education, vocational training, competitive employment, continuing education, or

adult services," but did not require states to supply such services.[22] In 1986, Congress slightly modified the statute regarding transition services to "include[ ] supported employment" as an acceptable form of "competitive employment."[23] In 1990, Congress amended the definition of transition services and required IEPs to contain "a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger)... ."[24] In the 1997 reauthorization of IDEA, Congress required that "beginning at age 14, and updated annually, a statement of the transition service needs of the child ... that focuses on the child's course of study (such as participation in advanced-placement courses or a vocational education program)" must be included in a child's IEP.[25] Congress again made changes regarding transition services in the 2004 IDEA reauthorization, requiring that IEPs contain appropriate measurable postsecondary goals based upon age appropriate transition assessments and that transition services needed to assist the child in reaching those goals be provided beginning no later than the first IEP when the child is 16.[26] It also again amended the definition of transition services. As Congress has amended the transition services requirements over the years, it has never tied them to any clear change in the definition of FAPE, expressed

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[22] Pub. L. No. 98-199, 97 Stat. 1357, 1367 (1983).
[23] Pub. L. No. 99-457, 100 Stat. 1145, 1163 (1986).
[24] Pub. L. No. 101-476, 104 Stat. 1103-04 (1990).
[25] Pub. L. No. 105-17, 111 Stat. 37-44, 84 (1997).
[26] Pub. L. No. 108-446, 118 Stat. 2647 (codified at 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)).

disagreement with the *Rowley* standard, nor indicated that FAPE was contingent on a child's attainment of transition goals. *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 948-951 (9th Cir. 2009). "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009).

B. The IDEA's Deference to States and Local Education Agencies Is the Fundamental Construct Underlying the States' Agreement to Comply With Its Expansive Statutory and Regulatory Requirements in Exchange for Federal Funds.

The IDEA makes clear that both the broad education policy decisions necessary to implement the Act as well as judgments concerning the educational needs of individual students are appropriately left to the states and local agencies. This construct is of fundamental importance to the states' agreement to act in accordance with the IDEA in exchange for receiving federal funds. To carry out their responsibilities under the Act, states have adopted extensive procedures to comply with IDEA's statutory and regulatory requirements. In turn, local school personnel are responsible for following these procedures to develop IEPs, deliver the special education and related services specified in those IEPs and assess each student's progress toward meeting individualized goals. This Court properly discerned

Congress' wisdom in crafting this arrangement when it set forth the *Rowley* standard that focuses on state and local educators' compliance with IDEA's IEP process and procedural safeguards. In *Rowley*, the Court encourages courts reviewing IEPs to find them to satisfy FAPE requirements as long as they are reasonably calculated to provide some educational benefit in keeping with academic standards set by the state for children educated in the general curriculum. This standard is consistent with the Court's longstanding recognition that educational decisions should not be second-guessed by judges.[27]

Such judicial and congressional deference provides state and local policy makers with some assurance of stability in the law as they decide how best to provide FAPE to children with disabilities, including ensuring that adequate funding is available to pay for the necessary services. As the costs of special education have increased exponentially over the years, states and local school boards have continued to make concerted efforts to meet their commitment to serve children with disabilities. To do so, states have adopted different funding methods to pay for these rising costs, even as Congress has never met its commitment to fully fund 40% of the additional costs of educating student with disabilities.[28] These additional costs have a significant impact on state and local education budgets as students with disabilities, on average,

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[27] *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40-44 (1973) (noting that "[e]ducation, perhaps even more than welfare assistance, presents a myriad of 'intractable economic, social, and even philosophical problems.'" (citation omitted)).

[28] McCann, *IDEA Funding*, *supra* note 15.

require nearly two times more in total expenditures than their non-disabled peers.[29]

States generally use one of three main funding methods to provide special education and related services to students with disabilities: formula funding, categorical funding, or reimbursement.[30] Thirty-three states and the District of Columbia use formula funding to pay for the cost of educating students with disabilities.[31] Under this method, states allocate a lump sum to school districts based on a per pupil formula that provides a supplemental amount for students with disabilities. Formula funding generally provides individual school districts the flexibility to make policy determinations and use funds based on their needs. A heightened FAPE standard could reduce the district's flexibility as students with disabilities demand even more resources than accounted for in the supplemental allocation. This might require the district to draw funds away from services for other students.

Twelve states fund students with disabilities through categorical funds, sometimes called block or flat grant funding. States allocate such funding outside of the state's primary funding formula.[32] Districts can only use the categorical funds for students with disabilities.[33] While costs for special education are isolated in these states, a heightened

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[29] *Id.*

[30] *See* Maria Millard, Stephanie Aragon, *50-State Review: State Funding for Students with Disabilities*, Education Commission of the States, http://www.ecs.org/clearinghouse/01/19/47/11947.pdf (retrieved Dec. 16, 2016).

[31] *Id.*

[32] *Id.*

[33] *Id.*

FAPE standard would require states to bear the burden of the increased costs to meet the heightened standard.

Five states fund students with disabilities through reimbursements, also allocated outside of the state's primary funding formula.[34] School districts must report their actual expenses to the state and then are reimbursed for a portion of their costs to educate students with disabilities. State reimbursement rates vary from 26.79% in Wisconsin to 100% in Wyoming.[35] A heightened standard would place an increased burden on local school districts as there is no guarantee that states would have additional funds to reimburse districts for the associated costs.

The Court should not adopt a new and unexpected FAPE standard, as it could disrupt complex state funding schemes and require difficult adjustments that impact the resources available to educate other children—burdens which the state and local education agencies did not knowingly accept.

CONCLUSION

Congress empowered IEP teams with both the authority and responsibility to identify students' needs, prioritize them, and offer special education and related services calculated to allow students with disabilities to receive educational benefit in keeping with state standards and in the least restrictive environment appropriate to their needs. Deference to

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[34] *Id.*

[35] *Id.*

the IEP process is the only workable manner by which to achieve the goals of IDEA. *Amici* urge the Court to reaffirm the standard it set forth in *Rowley* rather than adopt an artificial national standard that would call millions of programs into question and require schools to re-examine and litigate more claims, contrary to the purposes of the IDEA.

Based on the foregoing, and the reasons set forth in Respondent Douglas County School District RE-1's brief, *Amici* respectfully request that this Court affirm the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

Jonathan P. Reed
John W. Norlin
Emily E. Sugrue
Sarah E. Orloff
Fagan Friedman
Fulfrost LLP
1525 Faraday Ave.,
Suite 300
Carlsbad, CA 92008
(760) 304-6000
jread@f3law.com

Francisco M. Negrón, Jr.
Counsel of Record
National School Boards
Association
1680 Duke Street, FL2
Alexandria, VA 22314
(703) 838-6722
fnegron@nsba.org

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Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF OF 118 MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK SUPREME COURT AND APPELLATE CLINIC AT THE UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637
(773) 834-3189

MATTHEW S. HELLMAN
Counsel of Record
LEAH J. TULIN
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
mhellman@jenner.com

MICHAEL A. SCODRO
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 222-9350

RÉMI J.D. JAFFRÉ
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

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INTEREST OF *AMICI CURIAE*[1]

Amici are 118 current and former members of Congress who have a strong interest in ensuring the Individuals with Disabilities Education Act ("IDEA"), formerly named the Education for All Handicapped Children Act of 1975 ("EHA"), is interpreted correctly. A complete list of *amici* is provided in the Appendix to this brief, and it includes current and former ranking members and chairs of the House and Senate committees responsible for drafting and amending the IDEA, as well as other members who participated in the drafting or enactment of the IDEA and its amendments. Among them are:

- Patty Murray, *Ranking Member of the Senate Committee on Health, Education, Labor, and Pensions, and Ranking Member of the Senate Subcommittee on Labor, Health and Human Services, Education, and Related Agencies Appropriations*
- Robert C. "Bobby" Scott, *Ranking Member of the House Committee on Education and the Workforce*
- Tom Harkin, *Former Chairman of the Senate Committee on Health, Education, Labor, and*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made such a monetary contribution. Both parties have filed blanket letters of consent to the filing of *amicus* briefs with the Clerk's office.

Pensions, and Former Chairman of the Senate Subcommittee on Labor, Health and Human Services, Education, and Related Agencies Appropriations

- George Miller, *Former Chairman of the House Committee on Education and Labor*

Amici are intimately familiar with Congress's intent in crafting the "free appropriate public education" provision, and are uniquely situated to provide insight into the purpose of the IDEA and Congress's goal to ensure that students with disabilities have access to a meaningful public education.

Respondent argues that the IDEA's requirement that States provide a "free appropriate public education" ("FAPE") to students with disabilities is satisfied by providing educational benefits that are merely "more than *de minimis*." That is a vanishingly low standard, and it runs contrary to Congress's intentions at every step of the decades-long legislative process that culminated in the IDEA as it exists today. Rather, as *amici* explain, Congress considered the lack of meaningful public education for students with disabilities to be a problem of the highest order, and required States to take substantial steps to ameliorate that problem—not merely to provide students with benefits amounting to little more than nothing, as Respondent contends. From the outset, by passing the EHA, Congress intended the requirement that States provide an "appropriate" education to mean one that meaningfully benefits the student. Every subsequent amendment to the statute not only reaffirmed that mandate but also further strengthened and heightened

expectations of substantive academic achievement for these students. Accordingly, *amici* urge that the judgment below be reversed and remanded.

SUMMARY OF ARGUMENT

1. Congress passed the EHA to ensure that students with disabilities receive meaningful education benefits in school. Prior to the passage of the EHA, millions of children with disabilities effectively were denied an education in public schools in this country—either because they received little to no education in the classroom, or because they were shut out of schools altogether. Congress enacted the EHA in response to this unacceptable situation.

Congress was clear that the purpose of the EHA was to provide students with disabilities with a public education that is both "appropriate" and "emphasizes special education and related services designed to meet their unique needs." Pub. L. 94-142, sec. 3(a), § 601(c), 89 Stat. 773, 775. The EHA's legislative history is replete with descriptions of the law as requiring States to provide "full educational services" and "maximum benefits" to students with disabilities, to help them achieve their "maximum potential." The legislative history also emphasizes the need to ensure that children with disabilities receive sufficient educational benefits to become independent and integrated in their communities as adults. Respondent's argument that the statute requires nothing more than just-above-trivial educational benefits for students with disabilities is a clear departure from both the plain meaning of the statute and its legislative history.

2. In subsequent amendments to the statute, Congress repeatedly reaffirmed its intent to provide equal educational opportunity to students with disabilities—and clearly and consistently raised the standards for educating these students. In the 1990 amendments to the EHA (which renamed the law the IDEA), Congress conferred additional educational benefits on students to ensure that they would be equipped to meet their "full potential" as adults.

Congress went even further in the 1997 and 2004 amendments to raise the expectations and requirements for the education of students with disabilities. Recognizing that many students with disabilities continued to fail to meet their full academic potential, Congress sharpened its focus on the *quality* of education offered to students with disabilities as well as the attainment of educational *results* by students with disabilities. Importantly, these amendments systematically raised the expectations for the provision of material educational benefits to students with disabilities—including, for example, by requiring that their education be in general classrooms to the maximum extent possible, focusing on substantive educational improvement, and increasing accountability. As with earlier versions of the statute, numerous statements from Senators and Representatives at the time demonstrate Congress's clear purpose: to ensure that students with disabilities receive the educational benefits they need to achieve economic self-sufficiency, independent living, full participation, and equal opportunities in adulthood.

3. Respondent's interpretation of the IDEA, which would allow States to fulfill their duties under the statute by providing educational benefits that are simply "more than *de minimis*," would render the IDEA a hollow procedural formality. The standard advocated by Respondent could be satisfied without meaningfully improving educational outcomes for students with disabilities. Such a reading would frustrate Congress's clearly expressed intent and must be rejected.

Congress did not expend the time and effort to create a legislative scheme—and then repeatedly refine that scheme over a thirty-year period—to accomplish next to nothing. Nor did it intend for the IDEA's promises to students with disabilities to be illusory. To the contrary, the text and structure of the statute, together with its legislative history, make clear that Congress intended the EHA and the IDEA to reject the historic practice of ignoring students with disabilities' educational potential, provide meaningful educational benefits for students with disabilities and—significantly—raise the expectations and requirements for their educational outcomes.

ARGUMENT

I. Congress passed the EHA to ensure that students with disabilities would receive meaningful educational benefits from the nation's public schools.

Prior to the passage of the EHA, many children with disabilities were denied an education in our country's public schools. In some cases, these students were separated from their peers and segregated into classrooms for students with disabilities, where they received virtually no educational benefits. In other instances, these students were assigned to mainstream classrooms without the tools they needed to improve academically. Some were excluded from public schools altogether. Congress was first alerted to the scope of the problem in 1966, when an ad hoc Subcommittee on the House Education and Labor Committee reported that "only about one-third of the approximately 5.5 million handicapped children were being provided an appropriate special education," and that federal programs directed at them "were minimal, fractionated, uncoordinated, and frequently given a low priority in the education community." H.R. Rep. No. 94-332, at 2 (1975). The EHA itself acknowledged that "the special educational needs of [children with disabilities] are not being fully met," noting that "more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity." Pub. L. No. 94-142, sec. 3(a), § 601(b)(2)–(3), 89 Stat. at 774.

Congress passed the EHA to address the widespread educational neglect of students with disabilities by

ensuring that they received meaningful access to, and meaningful educational benefits from, public schools. Congress stated in the EHA's Statement of Findings and Purpose that the statute was drafted to ensure that all students with disabilities "have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." Pub. L. No. 94-142, sec. 3(a), § 601(c), 89 Stat. at 775. The EHA in turn defines a FAPE to mean "special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under [the statute]." Pub. L. No. 94-142, sec. 4(a)(4), § 602(18), 89 Stat. at 775.

As the statute makes clear, Congress did not merely guarantee that children with disabilities would be allowed to physically attend public schools, but also required that these children would receive an "appropriate" education designed to ensure that each student could learn and make meaningful progress. Consistent with this mandate, Congress imposed significant requirements on States receiving federal funding under the EHA—including that such States adopt policies and procedures to establish "a goal of providing full educational opportunity to all handicapped children." Pub. L. No. 94-142, sec. 5(a), § 612(2)(A), 89 Stat. at 780.

Indeed, as we discuss below, in floor statements, speeches, and House and Senate Reports, members of Congress repeatedly described the educational goals under the statute as ensuring that students with disabilities reach their "maximum potential," attain "full educational opportunities," and receive a "maximum benefit." To be sure, Congress recognized that the EHA was not guaranteed to produce any specific outcome for children with disabilities. *See* H.R. Rep. No. 94-332, at 14; S. Rep. No. 94-168, at 11, *as reprinted in* 1975 U.S.C.C.A.N. at 1435; *see also Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 192 (1982). But Congress's expressly stated intent to provide full opportunities for students with disabilities shows that the near *de minimis* standard Respondent advocates is incorrect.[2]

The sections of the legislative history that discuss the EHA's funding provisions are representative of Congress's intent in passing the EHA. The Report of the Senate Committee on Labor and Public Welfare first notes that Title VI, Part B of the Elementary and Secondary Education Amendments of 1974, a predecessor to the EHA, "greatly increased the

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[2] Contrary to the suggestion of the majority opinion in *Rowley*, 458 U.S. at 204 n.26, terms such as "maximum potential," "full educational opportunities," and "maximum benefit" are not mere isolated statements in the legislative history. Rather, these terms are used throughout the legislative history to explain and expound on important substantive provisions of the statute. Notwithstanding this misreading of the legislative history, however, *Rowley* correctly recognized that Congress intended to ensure that students have "meaningful" access to public schools, and not merely minimal access. *Id.* at 192.

authorizations" of federal funding so that the States "would be able to meet the mandate set forth in this legislation . . . to establish a policy of providing *full educational opportunities* for all handicapped children." S. Rep. No. 94-168, at 6 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 1425, 1430 (emphasis added).

The Senate Report reveals that Congress worked to improve the educational opportunities offered to students with disabilities so that "many would be able to become productive citizens, contributing to society," and to "increase their independence, thus reducing their dependence on society." *Id.* at 9, *as reprinted in* 1975 U.S.C.C.A.N. at 1433. The House Report is to the same effect: it expresses the hope that "[w]ith proper educational services many ... handicapped children would be able to become productive citizens contributing to society instead of being left to remain burdens on society." H.R. Rep. No. 94-332, at 11. Congress emphasized these same goals in subsequent amendments to the EHA. *See, e.g.*, S. Rep. No. 98-191, at 28 (1983). Likewise, approximately ten years after the passage of the EHA, Senator John Kerry noted that the statute presented students with disabilities with "an opportunity to achieve a new independence and become active in the mainstream of daily American life in a way that 10 years ago seemed like a mere dream." 132 Cong. Rec. 12,924 (1986). Congress thus plainly intended that students would benefit from their education sufficiently to prepare them to enter the workforce and achieve self-sufficiency—and not that they would simply be pushed through the school system without any expectation that they would learn.

The 1975 Senate Report further explains that the intent of the EHA was "to establish in law a comprehensive mechanism which will insure that those provisions [of the Elementary and Secondary Amendments] . . . are expanded and will result in *maximum benefits* to handicapped children and their families." S. Rep. No. 94-168, at 6, *as reprinted in* 1975 U.S.C.C.A.N. at 1430 (emphasis added). Similarly, the Senate Report states that the goal of the eligibility provisions for federal assistance under the EHA was to "assure that *full educational opportunities* are available" to students with disabilities. *Id.* at 3, *as reprinted in* 1975 U.S.C.C.A.N. at 1427 (emphasis added). The House Report echoes the goal of providing "free, *full educational opportunities*" for students with disabilities, emphasizing that the intent of the authorization provision of the EHA was "to provide permanent authorization and a comprehensive mechanism which will insure that those provisions enacted during the 93rd Congress will result in *maximum benefits* for handicapped children and their families." H.R. Rep. No. 94-332, at 5 (1975) (emphasis added).

Congress's substantive goal of improving educational outcomes for students with disabilities is further evident in discussions of the EHA's procedural protections. For example, the EHA required each local educational agency to develop an individualized education program ("IEP") for every student covered by the statute. In describing the purpose for this requirement, the House Report notes that Congress was responding in part to a "fundamental tenet[]" that "each

child requires an educational plan that is tailored to achieve his or her *maximum potential*." H.R. Rep. No. 94-332, at 13 (emphasis added); *see also id.* at 19 (emphasizing that the IEP will achieve one of the two "fundamental goals" of requiring an educational plan "tailored to achieve [a student's] *maximum potential*"). Similarly, EHA cosponsor Senator Bob Dole explained that the purpose of the IEP requirement was to ensure that there would be a "*meaningful* plan" for the student's benefit. 121 Cong. Rec. 19,500 (1975) (emphasis added).

In sum, although the EHA did not guarantee any particular outcome for students with disabilities, Congress's clear intent in the legislation was to provide full opportunities and benefits for students with disabilities, and not merely borderline *de minimis* ones.

II. Through the IDEA and its subsequent amendments, Congress has consistently and clearly raised expectations for the quality of education provided to students with disabilities.

The 1990 amendments to the EHA, which renamed the statute the IDEA, heralded Congress's shift in focus from providing access to equal educational opportunities for students with disabilities to conferring even greater material benefits, with the ultimate goal of "ensuring that children with disabilities grow up to meet their full potential as productive citizens." 135 Cong. Rec. 29,832–33 (1989) (statement of Sen. Harkin). Congress continued to expand the scope of the IDEA with additional amendments in 1997 and 2004, further bolstering the statute's requirements and expectations

with respect to the education of students with disabilities. Each of these amendments illustrates Congress's continued commitment to providing meaningful educational benefits to students with disabilities, in addition to a stronger emphasis on maximizing the full potential of each student.

A. 1990 Amendments

With carefully considered adjustments to terminology and enhancements to targeted programs, in the 1990 amendments Congress renewed its commitment to raising the substantive quality of education for students with disabilities, with the intent of bettering students' educational outcomes.

Congress's focus on improving the quality of education and outcomes for students with disabilities is abundantly evident in the House Report, which candidly recognized that still more support for students with disabilities was necessary to achieve Congress's goal of providing meaningful educational opportunities:

> Today the education of students with disabilities is at a crossroads. The focus over the past 14 years in educating students with disabilities has been on processes and procedures related to special education with access to public education as the goal. The time has come to shift the focus to quality and student outcomes. Simply assuring that services are present or placing students with disabilities into general classrooms is no longer good enough.

H.R. Rep. No. 101-544, at 30 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 1723, 1753 (quoting *The Education of Students with Disabilities: Where Do We Stand?* at 1). Heeding this call, the House Committee on Education and Labor declared that additional federal support was required to "assist States in producing, managing, accessing, and utilizing knowledge for program improvement needed to assure that children with disabilities reach their full potential." *Id.* at 24, 30–31, *as reprinted in* 1990 U.S.C.C.A.N. at 1746, 1753 (referring specifically to funding necessary "to expand the current emphasis on evaluation by including program content for the purpose of achieving program improvements" under § 618, which was amended "to focus on data collection, evaluation, implementation studies, special studies, and preparation of an annual report"). As noted by Senator Harkin, such measures were introduced in response to demands from the public to improve the quality of instruction for students—which he described as the "repeated plea that more be done to disseminate and translate research findings into classroom practice." 136 Cong. Rec. 27,031 (1990).

1. The 1990 amendments clearly rejected a passive approach to educating students with disabilities, in which it was considered sufficient simply to shepherd these students through school with little heed to whether they were making significant progress. Instead, Congress envisioned educational programs for students with disabilities that culminate, to the extent possible, in the skills and knowledge that these students can put to use far beyond the classroom. *See, e.g.*, H.R. Rep. No. 101-544, at 9, *as reprinted in* 1990 U.S.C.C.A.N.

at 1731–32 ("Although not fully responsible for ensuring an appropriate entrance into the adult world, school systems must do more to address the transition of special education students into adulthood."). The House Report focused on the application beyond schooling of the material benefits that students with disabilities garner through their education. For instance, the 1990 amendments added a requirement that the IEP contain a statement of "transitional services," to bridge the gap between schooling and post-education life, as well as an expectation that schools "develop such activities within an outcome-oriented process, thus enhancing a young adult's chances to achieve an adequate level of self-care, independence, self-sufficiency, and community integration." *Id.* at 10, *as reprinted in* 1990 U.S.C.C.A.N. at 1732.

Tellingly, the Committee envisioned the transition to post-education life as critical to ensuring the overall value of the educational opportunities guaranteed under the statute. Again describing programs to facilitate transition, the Committee decried the plight of students with disabilities who, having completed their education, "have no jobs, further training, or programs available to them," some of whom are "forced to linger at home, with literally nothing to do." *Id.* at 37, *as reprinted in* 1990 U.S.C.C.A.N. at 1760. "Years of valuable special education are wasted in such situations," the Committee warned, adding that "[m]ost importantly, human potential and hope are needlessly destroyed." *Id.* Congress thus recognized the importance of providing students with disabilities with meaningful instruction to

ready them for their later transition to post-education life.

2. The 1990 amendments also introduced new statutory provisions regarding the use of "assistive technologies" to improve the education of students with disabilities, which speaks to the same Congressional focus on enhancing the substantive educational benefit conferred by the statute. As existing technologies advanced and new ones came to the fore, Congress sought to harness their power to boost the material benefits available to students with disabilities through education. Accordingly, far from settling for the educational tools existing in 1975, Congress aimed to shepherd the law into the last decade of a century defined by light-speed technological progress. As Senator Harkin put it, the 1990 amendments were to be "responsive to . . . research findings, and new technological advances . . . promis[ing] to enhance the learning capacity of students." 136 Cong. Rec. 27,031 (1990).

In serving these goals, Congress defined assistive devices broadly to include "any item, piece of equipment, or product system . . . used to increase, maintain, or improve functional capabilities of individuals with disabilities." Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, sec. 101(g), § 602(a)(25), 104 Stat. 1103, 1104. Furthermore, these were to be supplemented by assistive technology services, including "any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device." *Id.*, sec. 101(h), § 602(a)(26), 104 Stat. at 1104. The Committee

emphasized that these new tools were introduced with the goal of improving the quality of education that students with disabilities receive. Congress aimed for nothing less than to "*redefine* an 'appropriate placement in the least restrictive environment' and allow greater independence and productivity." H.R. Rep. No. 101-544 at 8, *as reprinted in* 1990 U.S.C.C.A.N. at 1730 (emphasis added).[3]

Taken together, the push to incorporate assistive technologies and emphasis on preparation for the workplace demonstrate that, as the statute took deeper root in its second and third decades, Congress intended to ensure material educational benefits and concrete outcomes for students with disabilities. As emphasized by Senator Harkin, "discretionary programs of the Education of the Handicapped Act have a long history of responding to the educational needs of children with disabilities . . . keeping our Nation's special education system on the cutting edge." 135 Cong. Rec. 29,832 (1989).

B. 1997 Amendments

The IDEA Improvement Act of 1997, Pub. L. No. 105-17, 111 Stat. 37, is further proof of Congress's intent

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[3] This focus on access to technology was echoed by an emphasis of the importance of providing access to media, which was presumably seen as an increasingly important component of educational programs of all types as the decades wore on. For instance, the Committee noted that it had "long supported the greatest possible use of media by persons with disabilities to allow them equal access to America's telecommunications services," services that grew in number and potential use over the years. H.R. Rep. No. 101-544 at 51, *as reprinted in* 1975 U.S.C.C.A.N. at 1774.

to strengthen the IDEA's impact by placing a greater emphasis on educational outcomes for students with disabilities. The 1997 amendments were passed with overwhelming bipartisan and bicameral support[4] after a congressional evaluation found that "educational achievement and post-school outcomes for children with disabilities remain less than satisfactory." S. Rep. No. 104-275, at 14 (1996). Although children's access to education had dramatically improved under prior versions of the IDEA, children with disabilities were still failing courses at a disproportionately high rate and were twice as likely to drop out of school when compared with other students. Indeed, in testimony before the Committee on Labor and Human Resources, Dr. Brian McNulty explained: "Too often we in education have limited our expectations for children with disabilities. . . . These low expectations result in low performance and dismal results." S. Rep. No. 104-275, at 17. Congress thus determined that "the promise of the law [had] not been fulfilled," and sought to revise the IDEA to ensure not merely access to education, but also a "*quality* public education" for all children with disabilities. H.R. Rep. No. 105-95, at 84–85 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 78, 81–82 (emphasis added).

1. The 1997 amendments implemented several "substantive, important changes" to the IDEA, 143 Cong. Rec. 7923 (1997) (statement of Sen. Coats), further confirming Congress's intent to ensure that students

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[4] The 1997 Amendments received 420 affirmative votes in the house with only three negatives (143 Cong. Rec. 8046 (1997)), and ninety-eight affirmative votes in the Senate with only one negative (143 Cong. Rec. 8188 (1997)).

with disabilities receive meaningful educational benefits rather than those that merely border on the *de minimis*. In particular, the 1997 amendments further shifted the focus of the IDEA from an emphasis on ensuring educational *access* to an emphasis on improving individual student *results*.[5] As Congressman Frank Riggs, one of the Amendment's cosponsors, explained:

> [W]e are changing the focus of the bill by raising expectations for the educational achievement for all students, especially those with learning disabilities. States under the legislation must establish goals for the performance of children with disabilities and develop indicators to judge their progress. A child's individualized educational program, otherwise known as an IEP, will focus on *meaningful* and *measurable* annual goals.

143 Cong. Rec. 8012 (1997) (statement of Rep. Riggs) (emphasis added). Similarly, Senator Frist explained that the goal of the amendment was to "shift[] the

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[5] *See* H.R. Rep. No. 105-95 at 82, *as reprinted in* 1997 U.S.C.C.A.N. at 79 ("The purposes of the ... Amendments of 1997 [include] promot[ing] improved educational results for children with disabilities through ... educational experiences that prepare them for later educational challenges and employment."); *id.* at 84, *as reprinted in* 1997 U.S.C.C.A.N. at 81 ("This review and authorization of the IDEA is needed to move to the next step of providing special education and related services to children with disabilities: to improve and increase their educational achievement."); *id.* at 263 ("Improving educational results for children with disabilities is an essential element of [this] national policy.").

emphasis of the IDEA from simply providing access to schools to helping schools help children with disabilities achieve true educational results." *Id.* at 7866.

The Committee on Economic and Educational Opportunities similarly acknowledged this shift in focus, explaining that "[t]he purpose of this act is to . . . educate better children with disabilities and increase the educational opportunities available to these children, focusing on academic achievement, by placing an emphasis on what is best educationally instead of paperwork." H.R. Rep. No. 104-614, at 1 (1996); *see also id.* at 3 ("This Committee believes that the critical issue now is to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education.").

2. Thus, the goals of the amendments to the IDEA were to implement "high expectations for [special education] children" and to "ensur[e] their access in the general curriculum *to the maximum extent possible.*" IDEA Amendments of 1997, Pub. L. No. 105-17, sec. 101, § 601(c)(5)(A), 111 Stat. 37, 39 (emphasis added); *see also* 143 Cong. Rec. 7939 (1997) (statement of Sen. Mikulski) ("Decades of research have shown that educating children with disabilities is successful by having high expectations of special education students.").

To achieve these goals, Congress expanded the definition of children with disabilities, Pub. L. No. 105-17, sec. 101, § 602(3), 111 Stat. at 42–43, forbade the expulsion or lengthy suspension of such students, *id.*, § 615(k)(1)(A), 111 Stat. at 93–94, and required greater participation of students with disabilities in the general classroom setting, *id.*, § 602(29), 111 Stat. at 46; *see also*

S. Rep. No. 104-275 at 49–52. Senator Tom Harkin, a cosponsor of the 1997 amendments, explained that the purpose of these revisions was to ensure that children with disabilities "have the support they need so that they can become fully self-sufficient, productive, loyal American citizens in their adulthood." 143 Cong. Rec. 7927 (1997).

Further, for the first time, Congress insisted that students with disabilities receive an education grounded in the same general curriculum as that followed by their peers. The 1997 amendments required States to "establish[] goals for the performance of children with disabilities . . . that . . . are consistent, to the maximum extent appropriate, with other goals and standards for children established by the State," Pub. L. No. 105-17, sec. 101, § 612(a)(16)(A), 111 Stat. at 67, and to include students with disabilities "in general State and district-wide assessment programs, with appropriate accommodations, where necessary," *id.* § 612(a)(17)(A), 111 Stat. at 67. Members of Congress repeatedly emphasized the importance of ensuring more favorable outcomes for students through their inclusion in general classrooms and lessons. For example, a report prepared by the Committee on Economic and Educational Opportunities explained that "[t]he law creates a presumption that children with disabilities will be educated in regular classes" to "ensure that children's special education plans are in addition to the general education curriculum, not separate from it," and that "[t]he purpose of the IEP is to tailor the education to the child; not tailor the child to the education." H.R. Rep. No. 104-614, at 7, 14. Floor testimony echoed these

sentiments. For example, as Senator Harkin stated during hearings on the reauthorization, "the single most important principle addressed in [this amendment] is improving results for disabled children by ensuring their access to the general curriculum and general educational reforms." 143 Cong. Rec. 7859 (1997). Respondent's argument that the statute calls for little more than a *de minimis* benefit to students with disabilities is inconsistent with these statements of Congress's goals.

3. The new IEP requirements are the clearest manifestation of the goal that every child should receive a substantive education in school. As Congress's summary of the IEP changes emphasizes, almost all of the modifications to IEPs effectuated by the 1997 amendments require substantive improvements to individual students' education. *See* S. Rep. No. 104-275 at 49–52. For example, the amendments: (1) replace "'annual goals'" with "'*measurable* annual objectives' related to . . . enabling the child to *progress*"; (2) require "a statement of how the *progress* of the child toward measurable annual objectives will be measured"; (3) require indicators of progress to be "individualized for each child and include observable performance criteria" including "criteria for mastery" and a target date for mastery; and (4) require the child's IEP team to revise the IEP to address "continued progress or lack of expected progress" and to ensure that "the anticipated educational needs of the child" are being met. *Id.*at 50–51 (emphasis added).

Congress's intent in making these significant changes to the IEP processes was to ensure that IEPs "place[] greater emphasis on educational *results*" and to

"ensur[e] that each eligible child, as appropriate, has the opportunity to *progress* in the general education curriculum." S. Rep. No. 104-275, at 50 (emphasis added). The amendments' explicit focus on substantive educational improvement shows that Congress intended the new IEPs to help students achieve substantial educational progress rather than merely attain some trivial or *de minimis* educational benefit.

The Report of the House Committee on Economic and Educational Opportunities regarding the need to address the communication skills of students with disabilities are illustrative. The Committee explains that "[s]pecial attention should be given to communication. ... The ability of any child to communicate is at the heart of the ability to learn in school and ultimately to be a productive, participating member of the community." H.R. Rep. No. 104-614, at 15. The Committee gives the example of services required for blind students, "intend[ing] to move from having the burden of proof on the parents to prove that a [blind] child will use Braille, to a system in which schools will be expected to provide Braille services and would need to explain on IEP when they would not." *Id.* Ultimately, the House Report makes clear that "[t]he legislation established that goals must be measurable and relate directly to the child's educational needs." *Id.* Focusing on the individualized needs of each student, the Committee adds that "[i]t is not appropriate to have 'group goals' which every child in a particular school's special education program must have on his or her IEP. Every child is different and unique and therefore will have goals which are unique to that child." *Id.*

4. Congress also required students with disabilities to participate in state-wide assessment programs to monitor their educational achievements. Pub. L. No. 105-17, sec. 101, § 612(a)(17)(A), 111 Stat. at 67. These enhanced testing requirements would have made little sense if Congress had been satisfied with providing students merely just-above-trivial educational benefits. Rather, they were designed to ensure that the "unique needs" of each child are met and that the child is being adequately prepared for "employment and independent living." *Id.* § 601(d)(1)(A), 111 Stat. at 42. Thus, although Congress did not alter the wording of the definition of FAPE when it amended the IDEA in 1997, the content of the amendments as a whole underscores Congress's stated purpose to take the "next step" in providing education to disabled children by "improv[ing] and increas[ing] their educational *achievement*." H.R. Rep. No. 105-95, at 84, *as reprinted in* 1997 U.S.C.C.A.N. at 81 (emphasis added); *see also* 143 Cong. Rec. 8012 (1997) (statement of Rep. Riggs) ("States under the [1997 amendments] must establish goals for the performance of children with disabilities and develop indicators to judge their progress. A child's individualized educational program, otherwise known as an IEP, will focus on meaningful and measurable annual goals.").

5. Finally, in addition to increasing the substantive requirements and goals for students with disabilities, the 1997 amendments introduced a new layer of "procedural safeguards" for students and parents, Pub. L. No. 105-17, sec. 101, § 615, 111 Stat. at 88–99, which require state and local education agencies to provide an

option for mediation whenever a parent makes a request for a procedural due process hearing under the IDEA, *id.* § 615(e), 111 Stat. at 90–91. Congress also continued to require parents to exhaust administrative remedies before seeking relief in a state or federal court. *Id.* § 615(i)(2), 111 Stat. at 92. But as the House and Senate reports make clear, the mediation and exhaustion requirements were not meant to replace the statute's substantive goals with procedural ones. Rather, the procedural requirements were intended to help parents and schools achieve the Act's substantive goals "quickly[,] effectively, and at less cost," S. Rep. No. 104-275, at 53, and to do so in a way that "foster[s] a partnership to resolve problems." H.R. Rep. No. 105-95, at 105, *as reprinted in* 1997 U.S.C.C.A.N. at 103; S. Rep. No. 105-17, at 25 (1997). Indeed, the structure of the 1997 amendment also evinces Congress's intent to provide both substantive and procedural guarantees for students with disabilities, as one change in the amendment is that it "gather[s] all state and local agency requirements into single respective sections . . . and place[s] all procedural safeguards requirements in one section." H.R. Rep. No. 104-614, at 4.

In sum, with the 1997 amendments Congress intended to expand the extent of the meaningful educational benefits received by students with disabilities, in part by ensuring that these students were able to participate in the general curriculum "to the maximum extent possible." Pub. L. No. 105-17, sec. 101, § 601(c)(5)(A), 111 Stat. at 39. Respondent's interpretation of the IDEA as granting students with disabilities only just more than trivial educational

benefits, rather than mandating substantial educational progress, is inconsistent with the manifest purpose and stated intent of the 1997 amendments.

C. 2004 Amendments

Congress further elevated the expectations and requirements for educational services provided by States to students with disabilities with the 2004 amendments to the IDEA. These amendments required a higher degree of both substantive, material benefits to students with disabilities and procedural recourse for obtaining those benefits. In discussions regarding the amendments, members of Congress from across the political spectrum reaffirmed the intent to provide high-quality, substantive education for students with disabilities. Representative Boehner explained that, with the 2004 amendments, Congress had "one fundamental goal in mind[:] to improve the educational results for students with disabilities." 150 Cong. Rec. 24,295 (2004). He further stated that students with disabilities "deserve the same high quality teachers, and the same focus on their academic results" as their peers. *Id.* at 24,296. As Senator Reed explained, "[t]he legislation also enhances existing IDEA personnel preparation programs . . . to improve results for students with disabilities." 150 Cong. Rec. 24,276 (2004). Providing students with disabilities "the support they need to reach their full potential" was always a goal of the IDEA. *Id.* at 24,278 (statement of Sen. Enzi). The 2004 amendments "held[] States and school districts accountable for the academic and functional achievements of students with disabilities," which helped to "expand[] services to students with disabilities

in many ways." *Id.* at 24,280 (statement of Sen. Bingaman).

In the Senate Committee on Health, Education, Labor, and Pensions' 2003 report, the Committee noted that its first purpose in enacting these amendments was "[p]roviding a performance-driven framework for accountability to ensure that children with disabilities receive a [FAPE]." S. Rep. No. 108-185, at 5 (2003). The 2003 House Report from the Committee on Education and the Workforce emphasized "the importance of holding high standards for children with disabilities" and of "ensur[ing] that children with disabilities are able . . . to become integrated into the mainstream of American society." H.R. Rep. No. 108-77, at 86 (2003). Importantly, the Senate Report cited approvingly the President's Commission on Excellence in Special Education, specifically the Commission's recommendation to "[f]ocus on results—not on process." S. Rep. No. 108-185, at 4.

Both the Senate and the House Reports also point to the broader legislative framework around the time of the 2004 amendments to demonstrate Congress's commitment to providing educational outcomes—namely through the No Child Left Behind Act ("NCLB") of 2001, Pub. L. No. 107-110, 115 Stat. 1425, which amended the Elementary and Secondary Education Act ("ESEA"). Since the passage of the NCLB, the ESEA mandates standards-based assessments of students in schools, working to ensure that each student meets certain benchmarks by the time he or she completes each grade. The 2004 amendments seek to bring the IDEA in line with these goals of the

ESEA, particularly regarding a unified system of accountability in school districts. As the Senate Report explained: "NCLB established a rigorous accountability system . . . to ensure that all children, including children with disabilities, *are held to high academic achievement standards*. . . . Th[is] bill carefully aligns the IDEA with the accountability system established under NCLB to ensure that there is one unified system of accountability." S. Rep. No. 108-185, at 17–18 (emphasis added); *see also id.* at 18 ("Section 612(a)(15) maintains the requirement that States must establish performance goals and indicators for children with disabilities, but revises the language to align with provisions of the NCLB involving adequate yearly progress."). The House Report concurred on this point: "H.R. 1350 is centered around the following principles for reform: Increasing accountability and *improving education results for students with disabilities*." H.R. Rep. No. 108-77, at 83 (emphasis added). The Committee continued, "Currently, the Act places too much emphasis on compliance with complicated rules, and not enough emphasis on ensuring that academic results are being delivered for children with special needs. As a result of misplaced emphasis, too many children in special education classes have been left behind academically." *Id.*

Ultimately, the ESEA and the IDEA both work to "improve the academic achievement of special education students," 150 Cong. Rec. 24,291 (2004) (statement of Rep. McGovern), so that students with disabilities can "fully utilize their gifts," *id.* (statement of Rep. Sessions). Representative Castle furthered this point:

"Now, more than ever, in the spirit of No Child Left Behind, we must make sure that children with disabilities are given access to an education that maximizes their unique abilities and gives them the tools to be successful, productive members of our communities." *Id.* at 24,299. Respondent's "more than *de minimis*" standard is directly contrary to Congress's demonstrated intent to maximize the potential of students with disabilities, hold them to high academic standards, and improve their educational results to allow them to be productive members of society.

Notably, the first thirty-four pages of the Senate Report speak entirely to substantive reasons to require meaningful educational outcomes for students with disabilities. For instance, the report discusses the necessity of academic achievement for students with disabilities, S. Rep. No. 108-185, at 17–18, and of having students with disabilities participate in assessments, *id.* at 18; but it is not until page thirty-five that the Report even mentions procedural safeguards. Accordingly, like the legislative history of prior amendments, the legislative history of the 2004 amendments demonstrates that Congress intended the IDEA to provide procedural safeguards *and* ensure meaningful educational outcomes for students with disabilities.

III. Respondent's position would frustrate Congress's intent.

By contending that any educational benefit "just above *de minimis*" satisfies the requirements of the IDEA, Respondent asks this Court to adopt a drastically lower standard than the meaningful educational benefit that Congress intended to enable students with

disabilities to attain their full potential. The text, structure, and legislative history discussed above conclusively demonstrate that Congress did not enact the IDEA to be a hollow formality.

Rather, Congress enacted the IDEA to solve the real and serious problem of under-education of students with disabilities. Over a more than thirty-year period, Congress repeatedly enhanced the requirements of the statute, to increase the material educational benefits provided to students (and in turn, required from public schools) under the statute. At every turn, the legislative history demonstrates Congress's focus on ensuring that students with disabilities receive a meaningful education and are well-equipped for adult life after school. It strains credulity to think that Congress would have expended the time and effort to enact and amend this statute merely to give each student with a disability any "just above de *minimis*" educational benefit. Respondent's proffered interpretation of the statute is wholly inconsistent with Congress's clear intent in passing and repeatedly reauthorizing the IDEA, and thus should be rejected.

CONCLUSION

For the foregoing reasons and those stated by Petitioner, the judgment below should be reversed and the case remanded.

Respectfully submitted,

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK SUPREME COURT AND APPELLATE CLINIC AT THE UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637
(773) 834-3189

MICHAEL A. SCODRO
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 222-9350

MATTHEW S. HELLMAN
Counsel of Record
LEAH J. TULIN
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
mhellman@jenner.com

RÉMI J.D. JAFFRÉ
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

APPENDIX

APPENDIX

The Members of Congress participating in the *amici* are:

Current and Former United States Senators

Harry Reid
Tammy Baldwin
Michael F. Bennet
Richard Blumenthal
Cory A. Booker
Barbara Boxer
Sherrod Brown
Maria Cantwell
Benjamin L. Cardin
Robert P. Casey, Jr.
Al Franken
Tom Harkin
Mazie K. Hirono
Tim Kaine
Joe Manchin, III
Edward J. Markey
Jeffrey A. Merkley
Barbara A. Mikulski
Christopher S. Murphy
Patty Murray
Jack Reed
Bernard Sanders
Jeanne Shaheen
Mark R. Warner
Sheldon Whitehouse
Ron Wyden

Current and Former Members of the U.S. House of Representatives

Nancy Pelosi
Steny H. Hoyer
Alma S. Adams
Joyce Beatty
Xavier Becerra
Donald S. Beyer, Jr.
Suzanne Bonamici
Robert A. Brady
Julia Brownley
G. K. Butterfield
Tony Cárdenas
Andre Carson
Matt Cartwright
Kathy Castor
Joaquin Castro
Judy Chu

Katherine Clark
Yvette D. Clarke
William Lacy Clay
Steve Cohen
John Conyers, Jr.
Joe Courtney
Joseph Crowley
Elijah E. Cummings
Danny K. Davis
Susan Davis
Mark DeSaulnier
Debbie Dingell
Mike Doyle
Tammy Duckworth
Donna F. Edwards
Keith Ellison
Anna G. Eshoo
Sam Farr
Marcia L. Fudge
Alan Grayson
Raul Grijalva
Luis V. Gutierrez
Colleen Hanabusa
Alcee L. Hastings
Ruben Hinojosa
Eleanor Holmes Norton
Mike Honda
Jared Huffman
Shelia Jackson-Lee
Hakeem Jeffries
Eddie Bernice Johnson
Henry C. "Hank"
Johnson, Jr.
William R. Keating
Dan Kildee
James R. Langevin
Brenda L. Lawrence
Barbara Lee
Sander M. Levin
John Lewis
Ted Lieu
Dave Loebsack
Zoe Lofgren
Alan Lowenthal
Stephen Lynch
Carolyn Maloney
Sean Patrick Maloney
Betty McCollum
James P. McGovern
Gregory W. Meeks
Grace Meng
George Miller
Gwen Moore
Jerrold Nadler
Richard M. Nolan
Donald Norcross
Bill Pascrell, Jr.
Ed Perlmutter
Jared Polis
Cedric L. Richmond
Lucille Roybal-Allard
Tim Ryan
Gregorio Kilili Camacho
Sablan
Linda T. Sánchez
Janice D. Schakowsky

Robert C. "Bobby" Scott
José E. Serrano
Jackie Speier
Mark Takano
Paul D. Tonko
Chris Van Hollen
Juan Vargas
Nydia M. Velázquez
Debbie Wasserman Schultz
Bonnie Watson Coleman
Peter Welch
Frederica Wilson